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A

SELECTION OF CASES

ON

THE LAW OF PLEADING

UNDER MODERN CODES

BY

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PREFACE

When the editor began teaching Code Pleading, there was no case book which covered more than two or three topics of the general subject. In consequence, this set of cases has been collected for class room use, and is now published, primarily for the convenience of students.

No attempt has been made at chronological arrangement, because it did not appear practicable to treat the subject historically within the time which can reasonably be given to such a course.

It has been the aim of the editor to furnish the students with the material for an intelligent study of modern pleading, without attempting to deal with questions of practice or the special provisions of any particular code.

EDWARD W. HINTON.

Columbia, Missouri, September 10th, 1906.

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CASES ON CODE PLEADING

CHAPTER I.

NATURE AND FORMS OF ACTIONS.

PRELIMINARY NOTE.

“It is because rights exist and because they are sometimes violated, that remedies are necessary. The object of all remedies is the protection of rights. Rights are protected by means of actions or suits. The term “remedy” is applied either to the action or suit by means of which a right is protected, or to the protection which the action or suit affords. An action may protect a right in three ways, namely, by preventing the violation of it, by compelling a specific reparation of it when it has been violated, and by compelling a compensation in money for a violation of it. The term “remedy” is strictly applicable only to the second and third of these modes of protecting rights; for remedy literally means a cure,—not a prevention. As commonly used in law, however, it means prevention as well as cure; and it will be so used in this paper. In equity the term “relief” is commonly used instead of “remedy”; and though relief is a much more technical term than remedy, it has the advantage of being equally applicable to all the different modes of protecting rights.

“Though remedies, like rights, are either legal or equitable, yet the division of remedies into legal and equitable is not co-ordinate with the corresponding division of rights; for, though the remedies afforded for the protection of equitable rights are all equitable, the remedies afforded for the protection of legal rights may be either legal or equitable, or both.

“Actions are either *in personam* or *in rem*. Actions *in personam* are founded upon torts, actual or threatened, or upon breaches of personal obligations, actual or threatened. They are

called *in personam* because they give relief only against the defendant personally, i. e., that is the plaintiff has no claim to or against any *res*. Actions *in rem* are founded upon breaches of real obligations, or upon the ownership of corporeal things, movable or immovable. Actions founded upon breaches of real obligations are called *in rem*, because they give relief only against a *res*. Actions founded upon the ownership of corporeal things are called *in rem*, because the only relief given in such actions, is the possession of the things themselves. Actions *in rem*, as well as actions *in personam*, are (except in admiralty) in form against a person. The person, however, against whom an action *in personam* is brought, is fixed and determined by law; namely, the person who incurred (and consequently the person who broke or threatened to break) the obligation, or the person who committed or threatened to commit the tort, while the person against whom an action *in rem* is brought is any person who happens to be in the possession of the *res*, and who resists the plaintiff's claim. The relief given in actions *in personam* may be either the prevention or the specific reparation of the tort, or the breach of the obligation, or a compensation in money for the tort or for the breach of obligation. The relief given in an action *in rem*, founded on the breach of a real obligation, is properly the sale of the *res*, and the discharge of the obligation out of the proceeds of the sale. The relief given in an action *in rem*, founded on the ownership of a corporeal *res*, is the recovery of the possession of the *res* itself by the plaintiff.

"Actions *in rem* founded upon ownership are anomalous. As every violation of a right is either a tort or a breach of obligation, it would naturally be supposed that every action would be founded upon a tort or breach of an obligation, actual or threatened; and if this were so, the only actions *in rem* would be those founded upon breaches of real obligations. But when a right consists in the ownership of a corporeal thing, a violation of that right may consist in depriving the owner of the possession (and consequently of the use and enjoyment) of the thing. If such a tort had the effect of destroying the owner's right, as the physical destruction of the thing would, it would not differ from other torts in respect to its remedy; for the tortfeasor would then become the owner of the thing, and its former owner would recover its value in money as a compensation for the tort. And by our law, in case of movable things, the tort often has the effect practically of destroying the owner's

rights, sometimes at his own election, sometimes at the election of the tortfeasor. But, subject to that exception, the tort leaves the right of the owner untouched, the thing still belonging to him. He can, indeed, bring an action for the tort, and recover a compensation in money for the injury that he has suffered down to the time of bringing the action; but the compensation will not include the value of the thing, as the thing has not in legal contemplation, been lost. If, therefore an action for the tort were the owner's only remedy, he must be permitted to bring successive actions *ad infinitum*, or as long as the thing continued to exist; for in that way alone could he obtain full compensation for the injury which he would eventually suffer. But, as the law abhors a multiplicity of actions, it always enables the owner to obtain complete justice by a single action, or at most by two actions. Thus, it either enables him to recover the value of the thing in an action for the tort, by making the tortfeasor a purchaser of the thing at such a price as the jury shall assess, or it enables him to recover the possession of the thing itself in an action *in rem*. He is, however, further entitled to recover the value of the use and enjoyment of the thing during the time that the defendant has deprived him of its possession, together with a compensation for the injury which the thing itself may have suffered while in the defendant's possession; and this, he recovers sometimes in the same action in which he recovers the thing itself or its value, and sometimes in a separate action.

"It seems, therefore, that an action *in rem*, founded upon ownership, may be regarded as a substitute for an infinite or an indefinite number of actions founded upon the tort of depriving the plaintiff of the possession of the *res*, which is the subject of the action; and that such an action may, therefore, be regarded as in a large sense founded upon the tort just referred to, and the recovery of the thing itself as a specific reparation of that tort.

"Thus far, in speaking of actions and remedies, it has been assumed that the law of any given country is a unit; i. e., that there is but one system of law in force by which rights are created and governed, and also but one system of administering justice. Whenever, therefore, any given country has several systems, whether of substantive or remedial law, what has been thus far said is intended to apply to them all in the aggregate,—not to each separately. Thus, in English speaking countries

there are no less than three systems of substantive law in force, each of which has a remedial system of its own; namely, the common law, the canon law and admiralty law. There is also a fourth system of remedial law, namely, equity. What has been said, therefore, of actions and remedies applies to all these systems in the aggregate. * * *

“Common law actions, like actions generally, are either *in personam* or *in rem*. Common law actions *in personam* are founded upon the actual commission of a common law tort or the actual breach of a common law personal obligation. Common law actions *in rem* are founded upon the ownership of corporeal things, movable or immovable. The relief given in a common law action *in personam* is always the same; namely, a compensation in money for the tort or the breach of obligation, the amount of which is ascertained or assessed by a jury under the name of damages. The relief given in common law actions *in rem* is also always the same, namely, the recovery of the *res*; but then it is to be borne in mind that the only action strictly *in rem* that lies for a movable *res* is the very peculiar action of replevin; and, when that action cannot be brought, the only available actions are trover, in which the value of the *res* in money can alone be recovered, and detinue, in which either the *res* itself or its value in money is recovered, at the option of the defendant. Indeed, as has been already seen, the common law has not generally the means of enabling a plaintiff to recover the possession of a movable *res* against the will of the defendant. In replevin that object is accomplished by dispossessing the defendant of the *res*, and placing the same in the plaintiff's possession, at the very commencement of the action; but that would be obviously improper except when the defendant had acquired the possession of the *res* by dispossessing the plaintiff of it. The obstacle in the way of recovering possession of the *res* itself in an action of detinue does not arise from the nature of the action, but from the common law mode of enforcing a judgment. Detinue is in its nature an action purely *in rem*; and it only ceased to be so in practice because a judgment *in rem* was found to be wholly ineffective; and consequently a judgment was rendered in the alternative, namely, for the recovery of the *res* itself or its value in money.

“If, now, we compare the foregoing common law remedies with the scheme of remedies generally, as previously given, we find that the common law does not attempt (as indeed it could

not) to prevent either the commission of a tort or the breach of an obligation; nor does it attempt to give a specific reparation for either, except so far as the recovery of the *res* in an action *in rem* may be so considered; nor does it give any action whatever for the breach of a real obligation; nor does it enable the owner of movable things to recover the possession of them when wrongfully detained from him, except in those cases in which replevin will lie. * * *"—*Langdell, Survey of Equity Jurisdiction, 1 Harvard Law Review 111.*

Section 1. The Cause of Action.

PEOPLE v. BOOTH.

32 N. Y. 397. [1865.]

This is an action to restrain the defendants from intermeddling with the property pertaining to the fire department of the city of New York. The plaintiffs allege that said property belongs to the corporation of the city of New York, and is in the possession and the control of the fire department of the city and its chief engineer; that the appellants are wrongfully seeking to obtain the possession, management and control of such property, without the consent of the corporation, or of said chief engineer, and will succeed in doing so unless restrained by injunction. The complaint prays a perpetual injunction, restraining the appellants from meddling with, or receiving said property, and the other defendants from delivering it to them. The appellants answered, alleging, in substance, their appointment as commissioners, under the act of the legislature entitled "An act to create a metropolitan fire district of the state of New York, and establish a fire department therein," passed March 30, 1865, and their title as such commissioners to take possession and control of the fire department, and property mentioned in the complaint. To this answer the plaintiffs demurred for insufficiency.

The plaintiffs had judgment on the demurrer at the Special and General Terms of the Supreme Court of the first district; and the appellants brought this appeal therefrom.

DAVIS, J. On demurrer to an answer for insufficiency, the defendants are at liberty to attack the complaint on the ground

that it does not state facts sufficient to constitute a cause of action. (8 How. 261; 12 Barb. 573; Code, §§ 144, 148.)

The property described in the complaint is alleged to belong to the city of New York, in its corporate capacity. The plaintiffs assert no title or interest in the property or right to its possession or control. By what right they intervene to bring this action is not apparent; and there is no principle or precedent upon which their claim to do so can be upheld.

The corporation of the city of New York has abundant capacity to maintain suits to defend its property and possession; and it is questionable whether any lack of diligence in the exercise of this part of its powers, has ever been manifested. But however wanting in energy its spirit of litigation may be, the plaintiffs are not called upon to incite the city to activity, nor to become the voluntary champion of its wrongs, whether real or imaginary. The people of the state, like all other parties to actions, must show an interest in the subject matter of the litigation, to entitle them to prosecute a suit, and demand relief. This they have utterly failed to do in this case, and, for that reason the complaint ought to have been dismissed by the courts below.

Judgment reversed.

FIELD v. C., R. I. & P. R. R. Co.

76 Mo. 614. [1882.]

HENRY, J. This is a suit to recover damages for the destruction of a growing crop of corn on plaintiff's land, and, after relating plaintiff's ownership of the land, and that defendant had for years past been using a strip of said land for a right of way and running its train of cars over it, the cause of action is thus stated: "That defendant failed to keep its road in such condition as to prevent injury to the plaintiff; but negligently and carelessly failed to make, and keep open, proper ditches for the purpose of leading the water off the plaintiff's land; and in consequence of the careless and negligent conduct of the defendant, as aforesaid, the water was dammed up, and caused to flow back, and over the land of plaintiff, and destroy his growing crop, to his damage, etc." The defendant objected to the introduction of any evidence because no cause of action was stated in the pe-

tition, but the court overruled his objection, and on the trial the plaintiff obtained a judgment from which the defendant appeals. In his motion in arrest, defendant also made the objection that no cause of action was stated in the petition.

The complaint in the petition, and the only cause of action alleged, is "that defendant failed to keep its road in such condition as to prevent injury to plaintiff, but negligently failed to make, and keep open, proper ditches for the purpose of leading the water off of plaintiff's land." Placing the most favorable construction upon the petition, which is to take it as alleging "that defendant failed to keep its road in such condition as to prevent injury to plaintiff's land, by negligently and carelessly failing to make, and keep open, proper ditches to lead the water off plaintiff's land," it does not state a cause of action. It is not alleged that the railroad-bed was raised above the surface of plaintiff's land through which it passed, and if on a level with that surface it could not have obstructed the flow of surface water. If, on the other hand, it made an embankment where it ran through his land, the statute only requires ditches sufficient to carry off the surface water, along the sides of the embankment; and we know of no statute or principle of the common or civil law, which, on the facts stated in this petition, requires the railroad company to open ditches for the purpose of draining the land of an adjoining proprietor. There is no allegation that the company constructed its road so as to obstruct the flow of surface water and throw it back upon the plaintiff's land, and failed to make and keep open the ditches required by the statute, along the side of its road.

No facts are alleged in the petition which show any legal obligation upon the defendant to do what the plaintiff complains of its omission to do, and, when a suit is for a breach of duty, the facts out of which it arises must be pleaded.

If the nature of the complaint can be conjectured from the plaintiff's petition, it is of an obstruction of the flow of surface water. It is an insufficient statement of a cause of action in that view.

On the trial, plaintiff was permitted, over defendant's objection, to prove the obstruction of a running stream, and yet no one would construe the petition as stating such a cause of action. The plaintiff must state the facts which constitute his cause of action. He cannot state one and prove another, nor, if he states

none, can he supply the defects in his petition by evidence at the trial.

All concur in reversing the judgment and remanding the cause.

BOWEN v. EMERSON.

3 Or. 452. [1869.]

UPTON, J. The objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by failing to demur. (Code, sec. 70.)

The complaint states that "on or about the eighteenth day of February, 1868, plaintiffs sold and delivered to the defendant 4,000 pounds of flour, and that the same was worth \$212." It does not show that the defendant undertook or became obligated to pay for the flour within a designated time, or within a reasonable time, or when requested; nor that the time of payment had arrived before the commencement of the action. For aught that appears from the facts stated, the property may have been sold on credit, the time of which has not yet expired; or it may have been sold and delivered to the defendant upon the request and credit of another, with a full understanding that defendant was not to pay for it. It is assumed in argument that complaints like the one under consideration are sustained, by adjudications in other states, under codes similar to ours, and particular reference is made to the state of New York. A careful examination of the cases cited in support of this proposition will show that it is not correct. The decisions in some of the cases are based on special statutory provisions not contained in our code. For an instance the code of New York, section 162, provides, that "in an action or defense founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due him thereon from the adverse party a specified sum, which he claims." Precedents are found following this statute which do not state facts only, but which state conclusions. The same is true of other special provisions of statute. Cases predicated upon special provisions not contained in our code furnish but little assistance in this investigation. Fortunately, our code con-

tains but few special provisions on the subject of pleadings that amount to a departure from the general rule, that the complaint shall contain a plain and concise statement of the facts constituting the cause of action. Attempts to simplify by making special provision for particular cases or classes of cases tend to complicate the system and to confuse, rather than simplify, the practice. They are generally a means of annoyance to the practitioner, and of delay and expense to parties. Every experienced pleader knows that there is nothing more difficult to the young practitioner, or that taxes more the memory of those who have experience, than to be compelled to conform to special statutes in pleading. Some of the cases cited purport to be based upon the general rule. The most prominent among them is that of *Allen v. Patterson*, 7 N. Y. 476. The opinion in that case, it must be conceded, is quite out of the general current of authority, and it is difficult to reconcile it with the numerous decisions in the same state that announce and reiterate the rule that the code requires facts to be stated, and not the conclusions that result from the facts. The opinion assumes, without argument and without citing any authority relating to the construction of any modern code, that the statement that the defendant is indebted to the plaintiff in a certain sum is the statement of a fact, and with equal brevity it reverses the long settled rule that "if the meaning of the words be equivocal, they shall be construed most strongly against the party pleading them." The statement that the defendant is indebted to the plaintiff is substantially the conclusion to be found by the jury at the end of the investigation. (*Lienan v. Lincoln*, 2 Duer, 670; *Drake v. Cockraft*, 4 E. D. Smith, 34; *Seely v. Engell*, 17 Barb., 530; *Levy v. Bend*, 1 E. D. Smith, 169.)

It is not necessary in this case to determine to what extent the case of *Allen v. Patterson* should be considered law, because the complaint in this case does not show, by stating either facts or conclusions, that the defendant is indebted. The case of *Farron v. Sherwood*, 3 Smith 229, states the following rule, which seems entirely consistent with the enactments of the code: "It was not necessary to state in terms a promise to pay; it was sufficient to state facts showing the duty from which the law implies a promise." A fault with the complaint in this case is, that it neither states a promise to do any certain act at any specified time, nor states facts from which a duty to do so necessarily

arises, or from which a promise is necessarily inferred. It is not probable that any method of pleading, in actions for money due upon contract, will ever be discovered, that is more simple and easy in practice, or better calculated to apprise the court and the parties of the ground and nature of the action, or more likely to leave a clear and concise record of what has been done than that which is now prescribed in the code. Notwithstanding this conceded truth, we sometimes meet with pleadings in this class of actions that neither conform to the common law nor to the requirements of the code. In actions for money due on contract, the common law required a concise statement of the facts, and in some particulars the employment of technical language; the code requires a *plain* and concise statement of the facts. In other words, the common law required the facts to be stated concisely, and sometimes in technical language; the code requires the facts to be stated concisely, and in plain or ordinary language. In this class of actions the pleader is required to state the facts that show that a contract existed between the parties, and that it has been broken, and in what particular, and the amount of damages the breach has caused. Facts only must be stated, as contradistinguished from the law, from argument, from conclusions, and from the evidence required to prove the facts. (*Coryell v. Cain*, 16 Cal. 571.)

The complaint does not in this case state facts sufficient to constitute a cause of action.

Judgment should be reversed.

HOLMAN v. CRISWELL.

13 Tex. 38. [1854.]

HEMPHILL, Ch. J. This is a suit for specific performance. The plaintiff alleges that Jerome B. Alexander, in his lifetime, on the 30th December, 1840, executed to one Horatio Griffith his bond for title to 220 acres of land; that said Horatio Griffith, on or about the 18th of February, 1847, assigned his interest in said bond and the land therein to be conveyed to one Michael B. Griffith, who afterwards, in 1849, assigned said bond to petitioner.

A copy of the bond and assignments is made a part of the petition.

The condition of the bond is, that whereas Horatio Griffith purchased of Jerome B. Alexander two hundred and twenty acres of land for two hundred and twenty-five dollars, the receipt of which is acknowledged, the land to be selected out of either corner of a half league of land lying on the waters of Buckner's creek, belonging to the heirs of Benjamin Green, being part of the said Green's headright, the said Jerome B. Alexander binds himself, his heirs, etc., to make the selection to the best advantage, as he would for himself, and have the same legally surveyed, and make or cause to be made a good and bona fide title or deed, embodying the field notes therein, to the said Horatio Griffith, his heirs, etc., the said Griffith holding himself responsible to the said Alexander for the surveying and recording fees, etc.

The petition further alleges that the only part of Green's league of land to which Alexander had any title was two hundred and twenty-five acres, which are set out by metes and bounds; that Alexander departed this life in 1842; that his wife and son, Jerome, a minor, are his only heirs, and that his wife subsequently intermarried with one John T. Holman, who, together with the said wife and the minor, Jerome, are made parties defendant. The petition then alleges that by virtue of the execution of the bond by the said Jerome B. Alexander, and the various assignments and transfers by the parties therein described, the petitioner is entitled to a judgment and decree of the said Court, divesting the defendants of all title and interest in two hundred and twenty out of the two hundred and twenty-five acres of land, and vesting the same in the petitioner. The other matters set forth in the petition need not be noticed.

The defendants filed a general demurrer and other pleas, to which reference is unnecessary, as the only point which will be examined is that which arises on the assigned error in overruling the demurrer.

The grounds assumed by counsel in their elaborate argument in support of this assignment are:

1st. That there is no averment of breach of the conditions of the bond.

2d. That the plaintiff has no interest in the land, the transfer to him (set forth in the petition) being without seal.

To sustain the first ground several authorities have been cited from Common Law writers and Reports, to the effect that in actions on penal bonds breaches must not only be assigned, but stated with such particularity and certainty that the defendant may know what to defend. This action, however, if brought in Courts where there is a distinction between Law and Equity, would have been prosecuted in a Court of Equity. But there is no material difference in substance in the certainty with which the grounds of complaint must be set forth, whether an action be instituted in the one forum or the other. In equity the bill must state, not only the right, title, or claim of the plaintiff, with accuracy and clearness, but also the injury or grievance of which he complains; or, in other words, in cases such as the one before the Court, the breach or non-performance of his obligations on the bond.

Our own statute, however, furnishes the authoritative rule as to the matters which must be set forth in the petition, and this requires a full and clear statement of the cause of action with such other allegations, pertinent to the cause, as may be deemed necessary to sustain the suit. (Hart. Dig. Art. 671.)

(Referring to the authorities to ascertain the definition and scope of the phrase "cause of action," we find that the breach of contract or covenant sued upon is one of its essential elements. Chitty, in treating of the statement of the cause of action in *assumpsit*, says that the breach of the contract, being obviously an essential part of the cause of action, must, in all cases, be stated in the declaration (Vol. 1st, p. 322), and its omission cannot be cured even by verdict. (*Id.*, p. 337.) This is said in treating of the statement of the cause of action in *assumpsit*, but the rule is the same in actions of debt, covenant, etc.)

The rule is founded in good sense, and has as much application in our system of pleading as in any other. Unquestionably, in the nature of things, there can be no cause of action where no injury has been done. The invocation of the remedial aid of a Court necessarily pre-supposes the infliction of some wrong for which redress is sought, and this wrong must, as a matter of course, be stated in all Courts where the formality of pleading is required; and if it be not averred, no such case is made as entitles the complainant to the interposition of the Court.

The only difficulty in holding that the averment of breach is

in all cases an essential portion of the statement of the cause of action consists in this, that in some cases it is not incumbent on the plaintiff to prove the breach or non-performance of the contract or covenant. Its execution being established and its maturity passed, its breach will be presumed.

There is no doubt that, as a general rule, the plaintiff cannot be compelled to assert more facts than on a general denial he would be bound to prove in order to sustain his case. We have repeatedly held that he cannot prove what he has not alleged, and, as a general rule, he ought not to be compelled to allege what he is not bound to prove. But there is another general rule of like cogency and pervasive influence in pleading, and which is specially applicable to the question at issue, and that is, the plaintiff must allege such facts in his petition as would, were they admitted to be true, entitle him to judgment; and this certainly he could not demand unless he complained that some wrong or injury had been done him, or that some right had been withheld.

For instance, in this case it may be true that Alexander entered into the obligations which had been averred. The demurrer admits that such is the fact. But this fact alone would not authorize a decree for specific execution.

The bond may have been fulfilled. The obligor may not have refused, expressly or impliedly, to perform its stipulations. If so, the plaintiff has no ground of complaint, or to apply to the Court for relief.

He has not stated that the obligations have not been performed, and if on his averment merely that such obligations were made, judgment being given in his favor, the absurdity might be presented of a judgment being for him, when in fact he had no ground to complain against the defendant, and this, too, when he had not stated that he had any such ground, and when the defendant may fully have discharged his obligations.

It is true that the plaintiff has alleged that he is entitled to judgment. But this is a legal conclusion drawn by the pleader from the facts stated. It is not a fact, and consequently is not admitted by the demurrer, whose office is to admit facts only, and those which are well pleaded.

The circumstance that the plaintiff would not, on the trial, by the rules of evidence, be required to prove that the conditions of the bond had not been fulfilled, that such would be the *prima*

facie presumption on the introduction of the bond, does not relieve him from the necessity of making out such a case by his allegations as would, if their truth were admitted, be followed by judgment in his favor. Where suit is brought on a note of hand, the execution of the note, unless denied on oath, need not be proved, nor is the fact of non-payment to be established by proof; but this certainly would not exempt the plaintiff from stating that such note had been made, and that it had not been paid, or other equivalent averments of its execution and subsisting obligation; and without such averments the petition would be insufficient, as not showing that any wrong had been done, or that the plaintiff had, in fact, any cause why he should bring his action. The rules of evidence may be changed or modified. Parties may not in special cases be required to prove the facts which constitute their cases. But this does not relieve them, if they plead at all, from the necessity of stating such a case as would on its face be entitled to relief from the Court.

We are of opinion that on the first grounds, viz.: the want of assignment of breach, the demurrer should be sustained.

The other ground of demurrer, viz.: that the plaintiff has no interest in the land, the transfer to him being without seal, is not tenable.

Reversed and remanded.

HAMBLY ET AL., ASSIGNEES OF MOON v. TROTT,
ADMINISTRATOR.

1 Cowper, 371. [1776.]*

In trover against an administrator cum testamento annexo, the declaration laid the conversion by, the testator in his lifetime.

Plea, that the testator was not guilty. Verdict for the plaintiff.

Mr. Kirby had moved in arrest of judgment upon the ground of this being a personal tort, which dies with the person; upon the authority of *Collins v. Fennerell*, and had a rule to show cause.

*Argument of counsel omitted.

LORD MANSFIELD: If this case depends upon the rule, *actio personalis moritur cum persona*, at present only a dictum has been cited in support of the argument. Trover is in form a tort, but in substance an action to try property.

MR. KERBY: The executor is answerable for all contracts of the testator, but not for torts.

LORD MANSFIELD: The fundamental point to be considered in this case is, whether if a man gets the property of another into his hands it may be recovered against his executors in the form of an action of trover, where there is an action against the executors in another form. It is merely a distinction whether the relief shall be in this form or that. Suppose the testator had sold the sheep, etc., in question: In that case, an action for money had and received would lie. Suppose the testator had left them in specie to the executors, the conversion must have been laid against the executors. There is no difficulty as to the administration of the assets, because they are not the testator's own property. Suppose the testator had consumed them, and had eaten the sheep, what action would have lain then? Is the executor to get off altogether? I shall be very sorry to decide that trover will not lie, if there is no other remedy for the right.

ASTON, Justice: Suppose the executor had had a counter demand against the plaintiff, he could not have set it off in trover; but in an action for money had and received, he might. If these things had been left by the testator in specie, the conversion must have been laid to be by the executor. There seems to be but little difference between actions in trover and actions for money had and received. As at present advised, I incline to think trover maintainable in this case.

ASHHURST, Justice: The maxim does not hold as an universal proposition, because *assumpsit* lies. As to the case of *Collins v. Fennerell*, all the court considered it as unargued, and given up rather prematurely by Mr. Henley.

LORD MANSFIELD: The criterion I go upon is this: Can justice possibly be done in any other form of action? Trover is merely a substitute of the old action of *detinue*. (2 Keb., 502; Vent., 30; Sir T. Raym., 95.) The court ordered it to stand over.

Upon a second argument this day, Mr. Dunning cited *Cro. Car.*, 540; 1 Sid., 88.

LORD MANSFIELD: Many difficulties arise worth consideration. An action of trover is not now an action *ex maleficio*, though it is so in form, but it is founded in property. If the goods of one person come to another, the person who converts them is answerable. In substance, trover is an action of property. If a man receives the property of another, his fortune ought to answer it. Suppose he dies, are the assets to be in no respect liable? It will require a good deal of consideration before we decide that there is no remedy.

ASTON, Justice: The rule is, *quod oritur ex delicto, non ex contractu*, shall not charge an executor. (2 Bac. Abr., 444-445, tit. Executors and administrators, 5 Bac. Abr., 280, tit. Trover.) Where goods come to the hands of the executor in specie, trover will lie; where in value, an action for money had and received. But the difficulty with me is, that here it does not appear whether the goods came to the hands of the defendant in specie or in value.

Cur. advisare vult.

Afterwards, on Monday, Feb. 12th, in this term, Lord Mansfield delivered the unanimous opinion of the court as follows:

This was an action of trover against an administrator, with the will annexed. The trover and conversion were both charged to have been committed by the testator in his lifetime. The plea pleaded was, that the testator was not guilty. A verdict was found for the plaintiffs, and a motion has been made in arrest of judgment, because this is a tort, for which an executor or an administrator is not liable to answer.

The maxim, *actio personalis moritur cum persona*, upon which the objection is founded, not being generally true, and much less universally so, leaves the law undefined as to the kind of personal actions which die with the person, or survive against the executor.

An action of trover being in form a fiction, and in substance founded on property, for the equitable purpose of recovering the value of the plaintiff's specific property, used and enjoyed by the defendant. If no other action could be brought against the executor, it seems unjust and inconvenient that the testator's assets should not be liable for the value of what belonged to another man, which the testator had reaped the benefit of.

We, therefore, thought the matter well deserved consider-

ation. We have carefully looked into all the cases on the subject. To state and go through them all would be tedious, and tend rather to confound than elucidate. Upon the whole, I think these conclusions may be drawn from them:

First, as to actions which survive against an executor, or die with the person, on account of the cause of action. Secondly, as to actions which survive against an executor, or die with the person, on account of the form of action.

As to the first: where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labor, or property of another, or a promise of the testator, express or implied; where these are the causes of action the action survives against the executor. But where the cause of action is a tort, or arises *ex delicto* (as is said in Sir T. Raym., 57, *Hole v. Blanford*), supposed to be by force and against the King's peace, there the action dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water course, escape against the sheriff, and many other cases of the like kind.

Secondly, as to those which survive or die, in respect of the form of action. In some actions the defendant could have waged his law; and therefore no action in that form lies against an executor. But now other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. No action where in form the declaration must be *quare vi et armis, et contra pacem*, or where the plea must be, as in this case, that the testator was not guilty, can lie against the executor. Upon the face of the record, the cause of action arises *ex delicto*; and all private criminal injuries or wrongs, as well as all public crimes are buried with the offender.

But in most, if not all, the cases where trover lies against the testator, another action might be brought against the executor which would answer the purpose. An action on the custom of the realm against a common carrier is for a tort and supposed crime. The plea is not guilty; therefore it will not lie against an executor. But assumpsit, which is another action for the same cause, will lie. So if a man take a horse from another, and bring him back again, an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor.

There is a case in Sir Thomas Raymond, 71, which sets this

matter in a clear light. There, in an action upon the case, the plaintiff declared "that he was possessed of a cow, which he delivered to the testator, Richard Bailey, in his lifetime, to keep the same for the use of him, the plaintiff, which cow the said Richard afterwards sold, and did convert and dispose of the money to his own use, and that neither the said Richard in his life, nor the defendant after his death, ever paid the money." Upon this state of the case, no one *can* doubt but that the executor was liable for the value. But the special injury charged obliged him to plead that the testator was not guilty. The jury found him guilty. It was moved in arrest of judgment, because this is a tort for which the executor is not liable to answer, but *moritur cum persona*. For the plaintiff it was insisted that, though the executor is not chargeable for a misfeasance, yet for a non-feasance he is; as for non-payment of money levied on a *feri facias*, and cited Cro. Car., 539; 9. Co. 50, where this very difference was agreed; for non-feasance shall never be *vi et armis* nor *contra pacem*. But, notwithstanding this, the court held "it was a tort, and that the executor ought not to be chargeable." Sir Thomas Raymond adds, "*vide Saville, 40, a difference taken.*" That was the case of Sir Henry Sherrington, who had cut down trees upon the Queen's land and converted them to his own use in his lifetime. Upon an information against his widow, after his decease, Manwood, Justice, said: "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies, his executor shall be chargeable; but where the action is for damages only, in satisfaction of the injury done, there his executor shall not be liable." These are the words Sir Thomas Raymond refers to.

Here, therefore, is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.

So far as the tort itself goes, an executor shall not be liable, and therefore it is that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged.

There are express authorities that trover and conversion does not lie against an executor. I mean, where the conversion is by the testator. Sir William Jones, 173-4, Palmer, 330. There is no saying that it does.

The form of the plea is decisive, viz., that the testator was not guilty; and the issue is to try the guilt of the testator. And no mischief is done; for so far as the cause of action does not arise *ex delicto*, or *ex maleficio* of the testator, but is founded in a duty, which the testator owes the plaintiff, upon principles of civil obligation another form of action may be brought, as an action for money had and received. Therefore, we are all of the opinion that the judgment must be arrested.

Per Cur.

Judgment arrested.

McDERMOTT v. MORRIS CANAL CO.

38 N. J. L., 53. [1875.]

The opinion of the court was delivered by

KNAPP, J.: To the declaration filed in this cause, the defendants interposed a general demurrer. The first and second counts of the declaration are in tort, and set forth a cause of action in form and substance essentially the same. They charge that the plaintiffs, being the owners of a mill near to a certain stream in the County of Warren, were entitled to have, and for a long time had a portion of the water from said stream flow through a certain flood-gate or sluice-way, to the plaintiff's mill, for running it, and the defendants unlawfully pulled down a stop-gate placed in the stream for the purpose of turning the water to the mill, and by removing the gate diverted the water from the mill and so diminished its flow that the plaintiffs could not run their mill, and were thereby damaged. Counts in a declaration nearly identical with these were approved in the Court of Queen's Bench in *Beaston v. Weate*, 5 Ellis. & Black., 986. So far as the first and second counts of

the declaration are concerned there is no objection; the fault is in joining with them the third count. The third count substantially charges that defendants had agreed with the plaintiffs' grantors, their heirs and assigns, that they, the defendants, should keep a dam or a stop gate across their canal for the purpose of turning the water from the canal through the gate and sluice-way to plaintiff's mill. And that in pursuance of said agreement the defendants had constructed a dam and stop-gate accordingly, and afterwards had wrongfully pulled down the dam, by means of which the water had been drawn away from plaintiff's mill. This count presents a cause of action, to maintain which a contract of the defendants must be referred to as creating the right, for the violation of which plaintiffs complain. In such cases, the rule is that the action must be on the contract, and not on the tort. *Cabell v. Vaughan*, 1 Saund. R. (2d ed.), 291, note c; *Masters v. Stratton*, 7 Hill, 101; *Wilber v. Brown*, 3 Denio, 356.

In *Masters v. Stratton*, Chief Justice Nelson, in delivering the opinion of the court, says: The general result of all the decisions is well stated in the note to *Cabell v. Vaughan*, and is in substance this: "Where an action is maintainable for the tort merely, without reference to any contract made between the parties, no objection can be raised on the ground that the plaintiffs should have declared upon the contract; but when the action is not maintainable without referring to a contract between the parties, and laying a previous ground for it by such contract, then the plaintiff must proceed upon the contract and a special action on the case will not lie."

For this manifest misjoinder of causes of action there should be a judgment for demurrants.

STANLEY v. BIRCHER.

78 Mo. 245. [1883.]

MARTIN, C.: This was an action for injuries to the person of plaintiff, alleged to have been caused by the negligence of the defendant's testator, who died on the fourteenth day of June, 1879. This action was brought on the 17th day of September following.

It is alleged in the petition that on the 10th day of June, 1878, Rudolph Bircher, the testator, was owner and proprietor of the Laeclde-Bircher Hotel in St. Louis; that at the last mentioned date the plaintiff, for a valuable consideration, became a guest in the hotel; that for the said consideration it became the duty of said Bircher and he agreed to furnish safe accommodations for the necessary and reasonable wants of the plaintiff; that he did not perform the duty or keep the agreement aforesaid in this, that in and adjoining one of the halls in the third story of the hotel the said Bircher maintained an elevator shaft or pit, reaching from the basement to the third story; that the door to it was unskillfully constructed and dangerous to guests and was negligently left open by said Bircher and his servants; that at the date last aforesaid the plaintiff, having occasion to retire to the water closet, went into the hallway where said shaft was located, and without any fault or negligence of hers, fell through the open doorway into said shaft and was precipitated to the bottom, a distance of about fifty feet, whereby she sustained great and serious bodily injuries, permanently laming her, for which she asked damages in the sum of \$25,000.

The defendant, as executor of said Bircher, demurred on the ground that the cause of action did not survive as against the administrator or executor of the estate, and that the petition did not state facts sufficient to constitute a cause of action. The demurrer was sustained and final judgment entered for defendant in the Circuit Court, which was affirmed in the Court of Appeals. (9 Mo. App. 99.)

I am unable to perceive how the plaintiff can maintain her action in the face of the statutes in force at the time of the injury. In the general statutes of 1865, section 29, under the head of administrators, reads as follows: "For all wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executor or administrator against such wrongdoer; and, after his death, against his executor or administrator, in the same manner and with like effect in all respects as actions founded on contracts." Gen. St. 1865, 491, section 29. If there was no limitation or exception to this section, the plaintiff's remedy would be secured to her. But the next section operates as an express limitation or exception to it, and leaves

the plaintiff at common law. It reads as follows: "The preceding section shall not extend to actions for slander, libel, assault and battery or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff or to the person of the testator or intestate of any executor or administrator." Gen. Stats. 1865, 491, section 30. At common law this action did not survive as against the executor or administrator. And we thus see that it is expressly excepted from the statute which assumes to change the common law in this respect.

But, it is claimed by counsel for plaintiff that the action is for the breach of a contract, and that it is not an action on the case for injuries to the person. The allusions in the petition to the formal contract between the plaintiff and the proprietor of the hotel, whereby the plaintiff became a guest in the hotel, cannot change the true character of the action. In setting forth an action of trespass on the case, the pleader often finds it proper, although not absolutely necessary, to mention matters of contract connected with the tort, by way of inducement and explanation. In this case the relation of host and guest which originated in contract, explains how the defendant's testator came to owe the plaintiff a duty. That duty, however, the law imposes. It is a public duty which is not defined by the contract. Neither can the proprietor relieve himself from the duty by contract. The action, in truth, is for a violation of the duty which the law imposes, independent of contract. Neither the damages nor the scope of the action can be limited by the contract.

None of the cases cited from our reports will sustain the plaintiff's right of action in this case. In *James v. Christy*, 18 Mo. 164, a father sued a carrier for loss of services of a minor child, who had met his death as a passenger through the negligence of the defendant as a carrier. It was held that the father had a right of property in the services of his minor child, and that the defendant was liable to the father for any negligence which resulted in depriving him of that right. This right of action never belonged to the son, and it could not, therefore, be said to die with his person. It was regarded as an action for a wrong done to the "property" rights of the father, within the provisions of the first section hereinbefore cited, and not as an action for "injuries to the person of the plaintiff or the person of the testator or intestate of any executor or admin-

istrator," within the meaning of the second section cited by us. In that case the carrier lived and the father died before judgment. It was held that damages should be assessed for loss of the child's services up to the date of the father's death, and that all damages for loss of the society or comforts afforded by the child died with the father.

The judgment in this case should be affirmed. The other commissioners concur.

HORSE DOCTOR'S CASE.

Y. B. 19 Hen. VI, 49, 5. [1440.]

Writ of trespass on the case against one R., a horse doctor, for this, that the defendant at London undertook to cure his horse of a certain disease, and that he so negligently and improperly applied medicines, etc., that the horse (died).

PORTINGTON (for Deft.): We say to this that at Oxford, in the County of Oxford, we undertook to cure the horse of such a disease as you say, which we sufficiently did, without this, that we undertook to cure your horse at London. Ready.

MARKHAM (for Plff.): This is no plea, because I suppose by my writ that by his negligence he had killed my horse; then this is the cause of my grievance and of my action, which ought to be traversed by him, and not the undertaking. Wherefore, etc. As in case a carpenter undertakes well and sufficiently to build a house for me, which he does not do. In this case I shall have no action against him, and this proves that the misfeasance is the cause of action, which, according to my understanding, ought to be traversed.

NEWTON (J.): It seems that the plea is good, because it could be that he undertook to cure your horse at Oxford, as is said, and that he did so, and that afterwards at London your horse had the disease again, and that he of his good will applied his medicines, and afterwards your horse died; so for what he did of his good will you shall have no action. Therefore in our case it is not necessary to traverse this any more than in this case: My horse is sick and I go to a horse doctor to get his advice, and he says that one of his horses had such a disease and that he gave his horse certain medicines and therefore he

will do the same (for mine) and does so, and afterwards the horse dies. Shall the plaintiff have any action? I say not. Then it follows from this that he shall not have any action in our case unless he undertook, etc., which ought to be traversed, and this has been done well enough.

PASTON (J.) to Markham: You have not shown that he is a common horse doctor to cure such horse. So, although he killed your horse with his medicines, you shall not have an action against him without an undertaking, which proves that the traverse is well taken on the undertaking.

FORTESQUE (J.): Markham has said that if a carpenter undertakes to build a house for me and does not do it, that I shall not have an action, and that this proves that the undertaking is not the cause of action according to his understanding, and hence the traverse should not be taken on it. I say that in any case where he undertakes to do a thing and does not do it, from his non-feasance I shall have a good action,* and the traverse should be on the undertaking, which proves that the undertaking is the cause of action, from which it follows that the traverse shall be taken on the undertaking. As, suppose I have a ruinous house and a carpenter undertakes to repair the house sufficiently before a certain day and does not do it at all, from which my house goes to rack, then for this I shall have an action against him, and the traverse can well be taken on the undertaking. So here, although the horse died from his negligence, still the action shall be brought because he undertook to cure the horse and did not do it, just the same as where the house went to rack from his neglect. Therefore it seems that the plea is sufficient.

ASCOUGH (J.): It seems that undertaking is the cause which gives the action, just as a warranty does in this case. Suppose that I sell you woolen cloaks with a warranty that they are good and merchantable, and afterwards you find the cloaks full of moths. Then it is the warranty which is the cause of your action as much as the damage to the woolen, and the traverse can well be taken on the warranty. So in this case the undertaking is the cause of action, and the issue can well be taken on it. As in an action on the Statute of Labeureurs, the employment can as well be traversed as the leaving.

*Apparently not supported by authority at that time.

MARKAM: The writ is that he negligently and improperly applied medicines; so it seems that he killed him by these contrary medicines, and hence the death of the horse is the cause of action, which ought to be traversed to my mind.

NEWTON (J.): Negligently applied, etc., is bad. If I have a disease in my hand and he applies medicines to my heel, from which negligence my hand is maimed, still I shall have no action unless he undertook to cure me.

KNIGHT, ADMINISTRATOR, v. QUARLES.

2 Brod. & Bing. 102. [1820.]

Assumpsit. The declaration stated that before the time of making the promise therein contained, and in the lifetime of the deceased, the deceased had contracted with one Savory for the purchase of certain premises at Thetford, which Savory assumed to have sufficient power and title to sell and convey to the deceased; and, thereupon, in the lifetime of the deceased (in consideration of the premises, and that deceased at the special instance and request of the defendant, had retained and employed the defendant as his attorney and solicitor, to ascertain and investigate the title of Savory to the said premises, and to cause and procure the same, and a good title thereto, to be duly and effectually conveyed by Savory to the intestate as purchaser, for certain fees to be therefor paid by the intestate to the defendant), the defendant undertook and promised the deceased, in his lifetime, to perform and fulfill his duty in the premises. Breach, that although it was the duty of the defendant, by virtue of his retainer, to investigate carefully the title of Savory to the premises, and to take due and proper care that a bad title to the same should not be accepted by the deceased, yet the defendant, not regarding his duty in that behalf, but contriving and fraudulently intending, etc., did not nor would carefully investigate the title of Savory in the premises, or take due or proper care that a bad or insufficient title was not accepted and received by intestate, but, on the contrary, the defendant wholly neglected and refused to do so;

and in the lifetime of the deceased the defendant, in violation of his promise and undertaking, caused and procured, etc., the deceased, without his knowledge or consent, to accept and receive, and the said deceased in his lifetime did accordingly accept and receive from Savory a bad, defective, and insufficient title to the said premises; and thereupon such title was conveyed by Savory to the deceased in his lifetime, and the deceased paid Savory as the consideration money in that behalf £2,000, by means of which the deceased, in his lifetime and until his death, held the premises on a bad and insufficient title, and was in his lifetime wholly unable to sell or dispose of the same. The count then alleged special damages to the deceased and his personal estate. The declaration contained other counts, varying the statement of the contract, in one of which counts the defendant was charged generally and not as an attorney. To these counts the money counts were added.

Demurrer and joinder.

The court stopped Frere Serjt, who was to have argued for the plaintiff, expressing an unanimous opinion that there was no ground for the demurrer, an express promise being alleged, a breach of it in the lifetime of the intestate, and an injury to his personal property, the truth of which allegations was admitted by the demurrer; that it made no difference in this case whether the promise was expressed or implied, the whole transaction resting on a contract; that though, perhaps, the intestate might have brought case or assumpsit at his election, assumpsit being the only remedy for the administrator, it was very necessary the action be maintained or the defendant might escape out of the consequences of his misconduct, and the intestate's estate suffer an irreparable injury. It was further observed that if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured—though it was clear he, in his lifetime, might at his election sue the coach proprietor in contract or in tort, it could not be doubted that his executor might sue in assumpsit for the consequences of the coach proprietor's breach of contract. That it could not be pretended that the contract of the defendant in this case was a contract running with the land; but if it were so, an action would lie by the administrator for a breach and damage incurred in the time of the testator; and

as to the alleged omission of certain averments in the declaration, respecting the defendant's profession, at all events the admission of an express promise, implied by the demurrer, rendered any such allegation unnecessary.

Judgment for the plaintiff.

SCOFIELD v. WHITELEGGE.

49 N. Y. 259. [1872.]

Appeal from judgment of the General Term of the Superior Court in the city of New York, affirming a judgment in favor of the defendant entered upon the decision of the court at circuit dismissing plaintiff's complaint, and also affirming an order denying a motion for a new trial. The action was for the recovery of personal property. The complaint alleged that the defendant had become possessed of and wrongfully detained from plaintiff a piano of the value of \$400, and demanded a return thereof, etc. The answer denied the possession of any property belonging to the plaintiff, and denied the wrongful detention and plaintiff's ownership of the piano. Upon the trial, before the case was opened, defendant moved for a dismissal of the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, which motion was granted.

FOLGER, J.: The complaint in this action does not in terms show any right or title in the plaintiff upon which the former action of replevin would lie. That action could be maintained only by one who had the general or a special property in the thing taken or detained. That property must have been averred in the declaration, or it would not have sufficed the plaintiff's purpose. (Pattison v. Adams, 7 Hill, 126; see also Bond v. Mitchell, 3 Barb., 304; Vandenburgh v. Van Valkenburgh, 8 id., 217.) The chapter of the Code of Procedure of "The Claim and Delivery of Personal Property," was intended to supply the provisional relief which was theretofore obtained in the action of replevin. (See Commissioner's Report, p. 169.) There was no intention to change the requisites to maintain the action. There was no change made. Indeed the code, as re-

ported, expressly required an affidavit from the plaintiff, where a delivery was to be made, that he was the owner of the property, or lawfully entitled to the possession thereof by virtue of a special property therein. (Commissioner's Report, p. 170, §182, sub. 1.) And so it now is. (Code, §207.)

Nor is it less necessary now than then, for the plaintiff to aver the facts which constitute his cause of action. He must allege the facts, and not the evidence; he must allege facts, and not conclusions of law. The plaintiff here alleges that the defendant wrongfully detains from him the chattel in question. If, indeed, that be true, then it must be that the plaintiff has a general or special property in the chattel, and the right of immediate possession. But unless he has that general or special property and right of immediate possession, it cannot be true that it is wrongfully detained from him. The last, the wrongful detention, grows from the first, the property and the right of possession. The last is the conclusion. The first is the fact, upon which that conclusion is based. It is the fact which in pleading must be alleged.

Where facts are stated in a pleading which militate with a conclusion of law therein stated, the statement of facts will prevail. (Jones v. Phoenix Bank, 8 N. Y., 228; Robinson v. Stewart, 10 id., 189.) And is not the statement of a conclusion of law, without a fact averred to sustain it an immaterial statement?

The plaintiff says that the defendant wrongfully detains from him the piano. The fact involved in that statement is that he detains it. Granted, then, that he detains it. Why is it wrongful? Because the plaintiff is the owner by general or special right of property, and entitled to the immediate possession. But these are the facts which are to be shown. They have not been averred. How, then, can they be shown?

The plaintiff claims, however, that the averment in the answer denying detention, and denying ownership in the plaintiff, puts in issue those facts, and that the defect in the complaint is cured by that averment. He cites *Bate v. Graham* (11 N. Y., 237). But there the allegation in the answer was the affirmation of the very fact which it was objected, the complaint should have averred. There the omission from the complaint was of an allegation that the defendant maintained that a certain assignment of an insolvent debtor was not fraudulent.

The answer of the defendant made the very averment which was omitted from the complaint, and the omission of which was the ground of the defendant's objection to the complaint. The court well held that the complaint might have been amended; for both parties at the trial were maintaining the same fact. Here, however, the parties do not seek to maintain the same fact; and that which the answer avers is the direct opposite of that which the plaintiff must establish to recover. Would the plaintiff take the averment of the answer into his complaint as a part of its allegation? Then he would alleged that he is not the owner of the property, and that the defendant has not detained it from him. And then his complaint would show him without cause of action. (See *Pelton v. Ward*, 3 Caines, 73.)

The same considerations are applicable to the lack of the averment of a demand and refusal; if the plaintiff's case is to depend upon a wrongful detention, without a wrongful taking in the first instance.

The case of *Levin v. Russell* (42 N. Y., 251) is cited by the appellant. There are two facts which make it inapplicable here. There was in it no motion to dismiss the complaint for its insufficiency; and proof was made at the trial without objection of facts making a cause of action. Again: The complaint did allege that the property was that of the plaintiff. This does not appear in the report of the case in 42 New York; and from the statement there, one would think that the complaint was without an allegation of the plaintiff's ownership. On referring to the printed case, as it is found in the series of bound volumes of cases in this court in the State Library, the averment reads thus: "The following goods and chattels *of the plaintiff*." This is in exact accordance with the precedent for a declaration in replevin. (*Pattison v. Adams*, supra.)

The judgment should be affirmed with costs to the respondent.

All concur.

LAWTON v. CASE.

73 Ind., 60. [1880.]

ELLIOTT, J.: The appellees instituted this action to foreclose a mechanic's lien, and succeeded in obtaining judgment.

The complaint is in two paragraphs, to each of which demurrers were overruled.

The first paragraph was clearly bad, because it does not allege that the appellant was the owner or claimant of the real estate upon which the appellees seek to enforce a lien. The materials, for which the lien was filed, were furnished to a contractor and not to the appellant. The only inference that can reasonably be drawn from the allegations of the pleading is that Hill, the contractor, and not the appellant, was the owner of the real estate. The appellees could secure a cause of action against the appellant only by showing that he was the owner of, or claimant asserting some interest in the real estate, for they could have had no claim upon him, except on the ground that he owned, or claimed to be the owner of, the property for which the materials were furnished. There are other defects in this paragraph, but we deem it unnecessary to now consider them.

The second paragraph alleges that the appellant contracted with one Hill for the erection of a house on real estate owned by the former; that during the year 1877 appellees furnished the contractor with materials to be used in said house; that they were so used, and that the appellees, within sixty days from the completion of the house, filed notice of their intention to hold a lien. We have given only an outline of the paragraph, but one sufficiently full to exhibit the force of the objections urged against it.

The first point made by the appellant is, that this paragraph of the complaint does not show that the materials were furnished upon the credit of appellant's property. The law unquestionably is that the complaint must show that the materials were furnished for the building. (*Hill v. Sloan*, 59 Ind., 181; *City of Crawfordsville v. Lockhart*, 58 Ind., 477.) The complaint is not very direct or specific on this point, but we think enough is shown to make it good against this objection.

The second objection which appellant urges against this paragraph is, that it does not show that the notice was filed

within sixty days after the materials were furnished. The allegation in the body of the pleading, and the recital in the notice of lien, which is set out as an exhibit, show that the notice was filed within sixty days after the completion of the building, but it does not appear that it was filed within sixty days from the time the appellees furnished the materials. It was held in *Hamilton v. Naylor*, 72 Ind., 171, that the complaint must show that the notice was filed within sixty days from the time the materials were furnished. That case received a second and careful consideration upon full argument, on petition for a rehearing, and must be regarded as decisively settling the law upon this point. Upon the authority of that case, the paragraph under examination must be held bad. (Woods, J., dissents.)

Some confusion seems to have arisen upon a question of practice. It is said that a demurrer will not lie, but that the remedy is by motion to strike out so much of the complaint as refers to the lien. There are two distinct classes of cases, and the confusion has arisen from confounding them. Where there is a personal liability shown, and the lien is auxiliary or collateral to such liability, then the remedy is by motion, and not by demurrer. The second class is where there is no personal liability, and the entire right of action depends upon the validity of the lien. The case in hand is a type of the latter class. Here there is no personal liability, and there can be no right of action unless there is shown to be an existing valid lien. In such a case demurrer is the appropriate mode of presenting the question of the sufficiency of the complaint.

The appellant insists that the court did wrong in rendering a personal judgment against him, and that the relief of the appellees should be confined to the specific property covered by the lien. It is plainly the law, that no personal judgment can be taken upon a mechanic's lien, where the owner is sued by a sub-contractor, unless the notice provided for in section 649 of the statute is properly served upon the owner. *Phillips on Mechanics' Liens*, Secs. 447, 449; *Crawford v. Crockett*, 55 Ind., 220.

There is an attempt, in the first paragraph of the complaint, to state a cause of action warranting a personal judgment, but the paragraph fails utterly to do so. We have already noted the fact that the paragraph is bad, because it does not allege

that the appellant was the owner of the real estate upon which the house was erected, and to this defect we may now add (as we are considering the pleading from a different point of view) two other very material ones. The two defects to which we refer are the insufficiency of the notice served upon the appellant, and the failure to aver that there was any indebtedness from him to his contractor, Hill. A complaint which seeks to hold an owner for a debt created by the contractor must show ownership, the service of a sufficient written notice, and that when the notice was served, the owner was indebted to the contractor.

Where the complaint only seeks to subject the property to the lien, and asks no personal judgment, then, of course, it need not aver the existence of an indebtedness from the owner to the contractor, nor the service of notice as provided in section 649. The first paragraph of the complaint under mention is so framed as to attempt to create a personal liability and establish a right to a foreclosure of the lien against the property. It is bad as a complaint for personal judgment, as well as for the foreclosure of a material man's lien. The pleader, instead of showing a cause of action for both a personal judgment and a foreclosure, has failed to show a right to either.

Judgment reversed, at costs of the appellees.*

LINTON v. UNEXCELLED FIRE-WORKS CO.

128 N. Y., 672. [1891.]

Appeal from Supreme Court, general term, second department.

Action by Charles B. Linton against Unexcelled Fire-Works Company, to reform a written contract, and for judgment thereon. Defendant pleaded a counter-claim. At special term the court gave judgment against the counter-claim, and also dis-

*See also *Brown v. Joliet*, 22 Ill. 123 (Special assessment); *Clinton ex rel. v. Henry Co.*, 115 Mo. 557 (special tax bill); *Schmeiding v. Ewing*, 57 Mo. 78 (Mechanic's lien); *Plummer v. Eckenrode*, 50 Md. 225; *McGraw v. McCarty*, 78 Ind. 496. For a full discussion of actions by attachment against non-residents, etc., see *Freeman v. Alderson*, 119 U. S. 185.

missed the complaint. On appeal to the general term by both parties, the judgment dismissing the complaint was reversed, and judgment rendered for plaintiff, and the judgment against defendant's counter-claim was affirmed. Defendant appeals. Reversed.

It appeared that in 1884 plaintiff orally agreed to perform certain services for defendant, who agreed to give him \$2,000 per year as salary, and, in addition thereto, the "net earnings" of thirty shares of his (defendant's) stock to be paid by issuing to plaintiff said shares when the "net earnings" should aggregate \$3,000, their par value. This agreement was afterwards reduced to writing, and the words "net earnings" were replaced by the word "dividends." The writing was dated as of the day of the verbal agreement. The "net earnings" of the thirty shares during the three years of the continuance of the contract (1884 to 1887) were \$2,550, while the dividends were much less. Plaintiff had already received a certificate for 21 shares of the stock, and he contended that he was entitled to $4\frac{1}{2}$ shares more, so as to aggregate $25\frac{1}{2}$ shares (\$2,550 net earnings). Defendant contended that plaintiff was entitled to only 15 shares of the stock, or \$1,500, which was the amount of the dividends on 30 shares for the three years, and interposed a counter claim for 6 shares.

PECKHAM, J.: The trial court found the original agreement between the parties was based upon the earnings of the 30 shares of stock instead of upon the dividends. It found the written contract was executed in January, 1886, and while the oral contract was in existence. That written contract used the word "dividends" instead of "earnings." The plaintiff asked to have the written paper reformed so as to express the real agreement, and he alleged that the word "dividends" was used in the writing by mutual mistake. There was substantially no contradiction in the evidence as to the fact that the parties meant the written contract to embody the terms of the oral. The person who dictated the agreement to the stenographer employed by defendants was not himself present when the oral agreement between the plaintiff and the then president of the defendant was made, and so he asked the plaintiff what the terms were under which he was employed by defendant. While not positive as to the reply of the plaintiff whether he used the word "earnings" or "dividends," as the importance of the distinction had

not then appeared, he says he is of the impression that plaintiff used the word "dividends." At any rate, that word appears in the written contract signed by both parties.

The learned judge dismissed the plaintiff's complaint, because he said there was no proof of a mutual mistake in the use of the word "dividends" in the written contract. The court also overruled the defendant's counter-claim, on the ground that the payment of the 21 shares of stock, although an overpayment under the written contract, was yet a voluntary one, and so could not be recovered back. Both parties appealed, and the general term, on the plaintiff's appeal, reversed the judgment dismissing the complaint, and held the plaintiff entitled to recover the shares of stock claimed by him, and, without re-forming the written agreement, gave judgment absolute in plaintiff's favor, decreeing that defendant should issue the four and a half further shares claimed by the plaintiff. The judgment against the counter-claim of the defendant was, on defendant's appeal, affirmed, with costs. We think the general term erred in this disposition of the question. There was an original oral agreement between the parties, and the court finds that it provided for the issuing of the stock based upon earnings instead of dividends. The written agreement was intended to embody the terms of the oral one. It is said that Mr. Johnson, who acted for defendant, and dictated the substance of the agreement to be written out, no doubt intended to embody the terms of the oral agreement, but only as he understood them; and that, as he understood them to be dividends, he has made no mistake on the part of the defendant, and that hence there was no mutual error within the meaning of the law, and so the written agreement should not be reformed. Having found that the terms of the oral agreement included the earnings of the company as distinguished from the dividends, and the parties really intending to put in writing the terms of such oral agreement, if Mr. Johnson placed the word "dividends" therein, supposing that such was one of the terms of the agreement, when in truth it was not, and if the plaintiff signed the same supposing that it actually embodied the terms of the oral contract, when in truth it did not, we think a case was made out for the reformation of the written contract. The mistake of Mr. Johnson was in regard to what were in reality the terms of the oral contract, and when he intended to embody those terms in the written

contract, although he placed therein just what he intended to, if he in fact mistook those terms; and, if the plaintiff mistakenly supposed he had embodied in the writing the terms of the oral contract when he had not, a mistake was made which a court of equity has power to relieve against. We do not, however, think that relief could be had by reference only to the original oral contract, and in spite of the terms of the subsequent written one, without reforming such written one so as to conform to the truth. A written contract is always set out as the exponent of the oral understanding of the parties. While it exists as a full and legal agreement, it must control as to all the terms expressed in it, and, when such terms differ from those of prior oral ones, the writing must control. It is necessary, therefore, to reform it so as to express the true agreement. In this case the learned judge refused to find that neither party understood the words used in the written agreement to mean differently than the words of the oral agreement. There is some confusion in the findings in the case, caused, as I think, by the views of the learned judge as to the rights of the parties, assuming that Mr. Johnson meant to use the word "dividends" in the written agreement. In that event he thought plaintiff ought not to have the contract reformed. Differing somewhat with those views of the case, and regarding the order and judgment of the general term as in any event erroneous, we have thought it best for all parties that there should be a new trial, and the whole case more fully presented to the court. We think judgments of the general and special terms should be reversed, and a new trial granted, with costs to abide event. All concur.*

FELGER v. COWARD.

35 Cal., 650. [1868.]

'Appeal from the District Court, Thirteenth Judicial District, Mariposa County.

This was an action of ejectment for the possession of an eighth undivided interest in a mining claim and quartz mill situated in

*See also *Popijay v. Miller*, 133 Ind. 19 (reformation of a deed conveying more land than was intended). *Hancock v. Blackwell*, 139 Mo. 440 (cancellation of a release of a prior claim). *McAnaw v. Clark*, 167 Mo. 443 (right of an insane grantor to avoid deed).

Mariposa County. The complaint was in the usual form, and the answer traversed all of its material averments. It appeared from the evidence at the trial, which was by the Court, without a jury, that the defendant entered into a written agreement with the plaintiff to convey to the latter by sufficient deed said interest in said mining claim and mill, upon the payment to the defendant, at a stipulated time, of the purchase price, for which a promissory note was executed and delivered by plaintiff to the defendant. The evidence further tended to prove that plaintiff had, before suit brought, complied with said agreement on his part, and that the defendant refused to make said conveyance as stipulated, and repudiated said agreement. Prior to the execution of said agreement the plaintiff had been at work in said mine in the employ of the defendant and others of its owners, and after said agreement, and until a short time before the commencement of this suit, the plaintiff continued at work in said mine, receiving wages for his labor, and the dividends therefrom proportionate to said interest therein, of which, according to said agreement, he was to become the purchaser.

Judgment passed for the plaintiff in the Court below, without any findings of fact being made and filed, and thereupon the defendant moved for a new trial, on the ground that the judgment was against the evidence and against the law. The motion was denied, and the defendant appealed from the judgment and from the order denying said motion for a new trial.

By the Court, SANDERSON, J.:

In *Patterson v. The Keystone Mining Co.*, 30 Cal., 360, our attention was called to the statute of the 13th of April, 1860 (Stats. 1860, p. 175), in relation to the conveyance of gold mining claims, and we considered, *arguendo*, that it had abrogated the rule announced in the case of the *Table Mountain Tunnel Co. v. Stranahan*, 20 Cal., 198, to the effect that title to a mining claim would pass by a verbal sale, if accompanied by a transfer of the possession. In the subsequent case of *Goller v. Fett*, 30 Cal., 484, the effect of the statute came up for further consideration, and its construction became indispensable to the final disposition of that case, and the effect suggested in *Patterson v. The Keystone Mining Co.* was formally declared to be the effect of the statute, and that title to gold mining claims could be passed only by an instrument in writing. (See also *King v. Randlett*, 33 Cal., 318.)

The rule established in *Goller v. Fett* seems to be conclusive of the present case. It is an ordinary action of ejectment, and the plaintiff, at least, showed only a contract by the defendant to convey. His remedy was for specific performance, and, as incidental to that, delivery of the possession.

Order denying a new trial reversed and new trial granted.

Mr. Justice Sawyer expressed no opinion.

WILDMAN v. WILDMAN.

70 Conn., 700. [1898.]

Suit by Alexander Wildman against Susan E. Wildman for an injunction and for the delivery and concellation of certain deeds. Judgment for defendant, and plaintiff appeals. Affirmed.

ANDREWS, C. J.: Of the very numerous assignments of error presented by this appeal, those arising upon that part of the record which pertains to the third defense are controlling of the whole case. The trial court, in finding the issue made by the denial of that defense, in favor of the defendant, decided, as a matter of fact, that the same cause of action as is set forth in this complaint had been adjudicated and decided between the same parties in the former actions mentioned in said defense, and, in sustaining the defendant's demurrer to the plaintiff's replication to that defense, the court decided the same question, in the same way, as a matter of law. If the latter decision is without error, then there is no harmful error anywhere in the entire record.

"It is an established rule in the administration of justice that all controversies between parties, once litigated and fully and impartially determined, shall cease; and to that end no fact involved in such litigated controversy, shown by the record to have been material to its determination, and to have been put in issue and decided, whether the proceeding was at law or in equity, shall again be litigated between the same parties." *Munson v. Munson*, 30 Conn., 425, 433. "The rule of *res judicata* does not rest wholly on the narrow ground of a technical estoppel, nor on the presumption that the former judgment was

right and just, but on the broad ground of public policy that requires a limit to litigation—a curb on the litigiousness of the obstinate litigant. Like the statute of limitations, it is a rule of rest. As expressed by Judge Pardee in *Supples v. Cannon*, 44 Conn., 424, 428, “The policy of the law is that, if a claim has once been passed upon by a court of competent jurisdiction, it shall not be thereafter controverted between the same parties, and this in the interest of peace.” *Sargeant v. Steamboat Co.*, 65 Conn., 116, 126, 31 Atl. 543, 547, *Hamersley, J.*: “The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court.” *Duchess of Kingston’s Case*, 2 Smith, Lead. Cas., 573. The binding force of the rule stated in these authorities is not in any degree disputed by the appellant. He admits it. But he contends that this case does not come within it. It is difficult, however, to reconcile the plaintiff’s claim in this behalf made in this court with his claims made in the court below. We learn from the finding of facts that “the plaintiff offered in evidence the entire record, pleadings, finding of facts, and files of the judgment in two previous trials between the same parties, claiming the same as conclusive upon the parties in regard to the facts in this suit, and offered the same to prove the allegations of the complaint”; and that he “offered no other evidence than said record, pleadings, findings, and judgments in proof of the allegations of his complaint, and thereupon rested his case.” Claiming as he did that the record in the former case was conclusive upon the parties in this case, he thereby claimed (for otherwise the record would not have had that effect) that the same point was directly in issue in this case which was directly passed upon in the former case. *Duchess of Kingston’s Case*, *supra*. The application for an injunction against using the deeds was a part of that suit and nothing else.

Every action is brought in order to obtain some particular result, which is termed the “remedy.” This final result is not the “cause of the action”; it is rather the “object of the action.” Every judicial action has in it certain necessary elements—a primary right belonging to the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant, which consisted in a breach of such primary right and duty; a remedial right in favor of

the plaintiff, and a remedial duty resting on the defendant springing out of this delict; and, finally, the remedy or relief itself. Every action however simple must contain these essential elements, and, however complicated, it has no more. Of these elements the primary right and duty, and the delict or wrong, constitute the cause of action. They are the legal cause or foundation whence the cause of action springs. Pom. Rem., §453. Stated in brief, a cause of action may be said to consist of a right belonging to the plaintiff, and some wrongful act or omission done by the defendant, by which that right has been violated. *Veeder v. Baker*, 83 N. Y., 156, 160; *Yale Law Journal*, March, 1898, p. 246, Prentice, J.; *Phil. Code Pl.*, §31.

An inspection of the record in this action and a comparison of its averments in the former case show that this action is between the same parties as was the former one, and that in each action the parties are litigating in the same right, the plaintiff as the owner of certain lands—the same in the former action as in this case—and the defendant in her individual right; that the deeds which it is sought to set aside in this action are the very same deeds which it was sought to set aside in the former one; that the sole delict or wrongful act of which the plaintiff complained of in the former suit, and the main delict of which he now complains, *i. e.*, the putting of the said deeds on record, is the same in this action as in the former one; and that the main part of the relief claimed, *i. e.*, that said deeds be delivered up to be canceled, is the same in this action as in that.

In each of the actions we are comparing the plaintiff declares as the owner of certain land. The primary right of ownership of land includes in it certain special rights, as the right to use the land in any manner permitted by law, and to have the unmolested occupation of it, as well as to have an unmolested title to it. And these primary rights belonging to the plaintiff impose the correlative primary duty on the part of all mankind to forbear from molesting him in such use, occupation or title. In each of these actions the defendant is charged with putting certain deeds on the town record in the town where the land lies; and it is in each case the same deeds and the same act of putting them upon the record that is charged. It is this act of putting these deeds upon the record which is complained of in each action as violating the plaintiff's primary right to have an unmolested title to his lands. In both actions it is the

same primary right belonging to the plaintiff which is averred, and one and the same act done by the defendant by which that primary right is said to be violated. Going back to the definition of a cause of action given a little above, we are not able to see why "the legal cause or foundation whence the cause of action springs" is not the same in the former action as in this one.

It is true that the relief claimed is not a part of the cause of action. But the relief claimed may serve to determine what the cause of action is. The cause of action is the existence of that state of facts, or the existence of a state of facts, which entitles the plaintiff to the relief claimed. The plaintiff sued as the owner of certain lands. Such ownership clothed him with the primary right to have an unclouded title to those lands. The relief claimed was that deeds of those lands which the defendant had put on the town record be delivered up to be canceled. He would not be entitled to that relief unless he had such a title to the lands described in them that the act of the defendant in putting those deeds on the town record violated his primary right to have such an unclouded title thereto. And this he must, of course, set out in the complaint. It was a part of his case. Without it, he would have no right to the remedy, and the complaint would show no cause of action. If the deeds which the defendant had recorded were valid, at the time they were so put upon the records, then the plaintiff did not have such a title. It was essential, therefore, that in the complaint, these deeds be averred to be invalid at the time of such putting them upon the records; because that is the time at which, if ever, the act of the defendant in recording them did injury to the plaintiff, and otherwise the complaint would not show a sufficient cause of action. In his complaint in the former action the plaintiff negated the validity of these deeds, by alleging that they had never been executed or delivered by him. If this allegation was true, then the plaintiff was entitled to the relief claimed, for the reason that the deeds were invalid when recorded. In his complaint in the present action he negatives the validity of the deeds by alleging that they had, as between the parties, before they were recorded, been canceled. If this allegation was true, then the plaintiff was entitled to the relief claimed, for the same reason; that is, that the deeds were invalid at the time of the recording. It is the invalidity of the

deeds at the time, from whatever cause arising, that is the essential element of the plaintiff's cause of action. The cause which produces the invalidity is only an evidential circumstance; it is not an element, certainly not an essential element, in the cause of action. The invalidity of the deeds at the time of the recording being the same in each complaint, it is the same cause of action in both.

The cause of action is the existence of a state of facts which entitled the plaintiff to the relief claimed. Any state of facts which entitles the plaintiff to that relief, shows a cause of action. Such a state of facts may be, and usually is, made up of several ingredients. It is easy to perceive that there might be more than one statement of facts containing some one or more different ingredients, each showing the same right to recover with the facts of each existing at the same time. And, although the ingredients in such statements might differ, if each showed that the plaintiff was the owner of the same right, that the defendant had committed the same violation of that right, and that the plaintiff was entitled to the same relief, they would each show the same cause of action, and not a different one. Such, we think is this case. "If the facts alleged show one primary right of the plaintiff, and one wrong done by the defendant, which involves that right, the plaintiff has stated but a single cause of action. In applying this test, however, it must be observed that the single primary right, and the single wrong, which, taken together, constitute the one cause of action, may each be very complicated. For example, the primary rights of ownership include not only the particular subordinate right to use the thing owned in any manner permitted by the law, but also similar rights to the forbearance on the part of all mankind to molest the proprietor in such use. The facts which constitute the delict complained of may embrace not only the wrongful obtaining, and keeping possession, in such a case as the one last supposed, but also the procuring and holding deeds of conveyance, or other muniments of title, by which such possession is made possible and to appear rightful. These suggestions are necessary to guard against the mistake of supposing that a distinct cause of action will arise from each special subordinate right included in the general primary right held by the plaintiff, or from each particular act of wrong

which, in connection with others, may make up the composite, but single, delict complained of. Pom. Rem. No. 455.

The inspection of the record also discloses that the different causes by which the invalidity of the deeds is shown were both known to the plaintiff before he brought the former suit, and that, by proper care, both might have been shown on the former trial. A single cause of action cannot be split in two. If the plaintiff's complaint in the former action was so framed that he could not avail himself of all the evidence which he had to prove his right to recover, and so suffered a defeat, it may be his misfortune. He sought an amendment to enlarge the issue, but at so late a stage of the trial that the judge for that reason disallowed the motion. By that judgment the plaintiff is bound. His cause of action has been adjudicated. He cannot now have another trial, to enable him to use such other evidence to obtain the same remedy. *Cromwell v. Sac. Co.*, 94 U. S. 351; *Burritt v. Belfey*, 47 Conn. 323. "The policy of the law is that, if a claim has once been passed upon by a court of competent jurisdiction, it shall not thereafter be controverted between the same parties, and this in the interest of peace." "There must be a limit to litigation: a curb on the litigiousness of obstinate litigants." *Sargeant v. Steamboat Co.*, *supra*. *Hamersley, J.* There is no error. The other judges concur, except *Hamersley, J.*, who dissents.

HAMERSLEY, J. (dissenting). The only issue raised by the pleadings and tried by the first court was, did the plaintiff execute and deliver the deeds? He asked to have them delivered up in court for cancellation solely on the ground that they were not his deeds. Upon this issue evidence was received tending to support, and, as the court found, proving, a state of facts which entitled the plaintiff to an injunction against a plain abuse of trust in the use of the property described in the deeds. The plaintiff claimed that, because of this state of facts, the giving of the deeds to the defendant was not a legal delivery with intent to pass the title. The court overruled the claim, and rendered judgment for the defendant. It thus appears by the record that the facts found by the court, which support an action founded on a breach of trust, were held not relevant to the issue in the former action founded on possession of void deeds. The present action is based upon the breach of trust and asks an injunction against a further breach, and the court be-

low holds that this is the same cause of action adjudicated in the former suit.

In the first action the plaintiff's right was to have void deeds in the possession of another canceled. This right the law gives him, irrespective of any use that may be made of them. The law imposed upon the defendant a duty to surrender the deeds, however innocent her possession might be. The delict or wrong was a neglect to surrender the deeds. The remedy in such a case is a compulsory surrender in court for cancellation. In the second action the plaintiff's right is to have a trust, which had attached to a valid conveyance of land, enforced. The law imposed upon the defendant the duty of faithful performance of that trust. The delict or the wrong was a violation of the trust by mortgaging the trust property and appropriating the proceeds to her own use. The remedy in such case is an enforced reconveyance of the property or an injunction against the further abuse of the trust. The latter remedy is sought in this suit. I fail to see how two causes of action can be the same when, in each, the right of the plaintiff, the duty of the defendant, the delict charged, and the remedy sought are all different. It is suggested that identity consists in the primary right of a landowner to have an unclouded title. If we go back to such broad primary rights as the operative test of the scope of a judgment, we lose our hold on the certainty which is essential to a judgment, but by that test the causes of action are not the same. In the present case the plaintiff seeks something very different from the enforcement of his primary right to an unclouded title. He seeks to compel the holder of a legal title to execute a trust. These deeds were drawn in 1884. The plaintiff's cause of action set up in the first place was complete upon the defendant's possession of the deeds. (The allegation that they had been placed on record was mere matter of aggravation, which could not alter or enlarge the cause of action alleged.) Had the plaintiff brought his first action in 1884, and the same judgment been rendered against him, would it for a moment be claimed that he could not now maintain his present action to enforce the execution of a trust under the deeds then adjudged to be valid? Certainly, in such case, the two causes of action must be entirely distinct. How does the lapse of time effect the nature of the cause of action? During the intervening years a new and a different cause of action has accrued. Why

should not the plaintiff try—First, the cause of action that has existed since 1884, and, second, the different cause of action that has intervened? It is said he cannot split a cause of action. True, the rule against this is strict and salutary. But it does not mean that he must join different causes of action, even when arising from the same transaction. The plaintiff might have joined the cause of action in this suit with the one stated in the former suit, but he could not have stated them as one cause of action. The allegation that he never executed or delivered the deeds is essential to his cause of action in the first suit, and the allegation that he did execute and deliver the deeds is essential in the second; but these allegations are contradictory and repugnant, and cannot both be alleged as facts supporting a single cause of action. The plaintiff could not on the former suit, have tried the breach of trust now alleged, without stating it as a distinct cause of action. This he was not bound to do.

It appears upon record that the judge who tried the first case was of opinion that the plaintiff was entitled to recover in an action like the one now before us, and he rendered judgment against him because the facts potent to support this action were not relevant to the one then on trial. And it is now held that, having proved those facts in the former action, where the court said they were not relevant, the plaintiff cannot now prove them in this action. A record disclosing, so far as the opinion of the judge goes, the right of the plaintiff to the remedy now sought, is made, and apparently for that very reason, a bar to his asserting that right. It sometimes happens that a litigant's cause is so mismanaged that a court finds it impossible to discover a remedy. The plaintiff's cause may have been mismanaged, but he ought not to suffer unless the necessity is clear. For the reasons given, I think no necessity exists; that the superior court erred in sustaining the third defense; and that a new trial should be granted.

X Section 2. One Form of Action.

CODE PROVISIONS: *Only one form of civil action.*

There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished.—*N. Y. Code Civ. Proc. Sec. 3339.*

Civil actions and designation of parties thereto. There shall be in this state but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action; and the party thereto complaining shall be known as the plaintiff, and the adverse party as the defendant.—*Mo. R. S. 1899. Sec. 539.*

BARNES v. QUIGLEY.

59 N. Y. 265. [1874.]

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict, and affirming an order denying a motion for a new trial.

The complaint in this action, in substance, alleged that on the 3d day of April, 1871, plaintiff was the owner of a promissory note made by defendant, payable to the order of Britton & Co., for \$2,165.86; which was indorsed by the payees and transferred to plaintiff before maturity; that prior to its maturity the payees failed and made an assignment; that on or about the day mentioned, defendant, for the purpose of deceiving plaintiff and inducing him to surrender up the note for a less sum than was due thereon, falsely and fraudulently represented that the note was made by him solely for the accommodation of the payees, he receiving no consideration whatever therefor, and that all moneys paid by him upon the note would be an entire loss, whereas the note was in fact for merchandise sold by the payees to defendant, and that he received full value for the note. That plaintiff relying upon said representations, and being ignorant of the facts, was induced thereby and did accept \$582.70 less than the amount due, and surrendered up the note.

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note.

That by reason of the premises said plaintiff has been de-

ceived and defrauded by said defendant out of said sum of \$582.70, and has sustained damage to that amount.

*2. answer
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Defendant's answer admitted the allegations of the complaint as to the making, indorsement and transfer of the note, the failure of the payees, and that he paid the sum of \$1,600 in full settlement of the note, which was surrendered up to him. He denied all the other allegations of the complaint. On the trial plaintiff moved for judgment on the pleadings, which motion was granted, and directed a verdict for the balance unpaid on the note, to which defendant's counsel duly excepted.

ALLEN, J.: The complaint is for fraud, and not upon contract. Whether the facts stated constitute a cause of action is not material. The whole frame-work is in fraud, and the cause of action, as set forth, is based upon the false and fraudulent representations of the defendant, by which the plaintiff was induced to surrender and give up to the defendant his promissory note, held and owned by the plaintiff, for an insufficient consideration, an amount considerably less than its face, by reason whereof, as alleged, the "plaintiff has been deceived and defrauded out of said sum of \$582.70, and has sustained damage to that amount."

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The theory of the plaintiff at the commencement of the action, and the foundation of his claim as formally made in his complaint, was, that a surrender of the note upon the receipt of an agreed sum, less than the amount actually due in satisfaction for the full sum, was equivalent to a release under seal, and effectually discharged the debt. In that view he could only recover by impeaching the release and discharge, for fraud, and he framed his complaint to meet the case in that form. His whole cause of action rested upon the alleged fraud, and it was an entire change of that cause, and a surprise upon the defendant, when this view was ignored by the counsel and the court at the trial, and a verdict ordered upon a denial in the answer of the only material allegations of the complaint. We are not to speculate upon the question whether the surrender of the note did discharge the obligation. The plaintiff assumed that it did, and brought his action to recover for the fraud by which the discharge was procured. It was error in the court to change the form of the action, by striking out or treating as surplusage the principal allegations—those which characterize and give form to the action—because, perchance, there may be facts

**The contract was mere inducement & the tort
is the gist of the action*

stated by way of inducement spelled out, which would, when put in proper form, have sustained an action of assumpsit.

The defendant was called upon to answer the allegations of fraud, and not to resist a claim to recover in assumpsit. The two forms of actions might require very different defences. This is not the case of an obligation or contract fraudulently incurred, in an action upon which the fraudulent acts of the obligor or promissor are averred, which, as they do not enter into the contract, and are not essential to the cause of action, may and should be rejected as surplusage, as in *Graves v. Waite* [59 N. Y. 156], recently decided by this court. The plaintiff was not, under the complaint, entitled to a verdict and judgment, as in an action upon the note. The defendant, in preparing his answer and putting in his defence, was as unconscious of any necessity of stating and setting up any defence he might have to the note, as the framer of the complaint was innocent of any intent to make a case for a recovery upon the note, as a valid and subsisting obligation. While the Code is liberal in disregarding technical defects and omissions in pleadings, and allowing amendments, it does not permit a cause of action to be changed, either because the plaintiff fails to prove the facts necessary to sustain it, or because he has mistaken his remedy, and the force and effect of the allegations of his complaint. (Code, § 173; *DeGraw v. Elmore*, 50 N. Y., 1; *Ross v. Mather*, 51 id., 108; *Elwood v. Gardner*, 45 id., 349.)

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The judgment must be reversed and a new trial granted, costs to abide the event.

All concur in result.

for def

Judgment reversed.

MILLER v. HALLOCK.

9 Col. 551. [1887.]

Special assumpsit

Action to recover the contract price of a lot of wood alleged to have been sold and delivered to the defendant. The answer specifically denied each allegation of the complaint. One Sar-
geant, representing himself to be the defendant's agent, pre-
tended to purchase for defendant 250 cords of wood at \$2.50
per cord and directed plaintiff to ship it to the defendant. Sar-

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resented false-
ly that he was
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to def.

geant was not the defendant's agent, but represented himself to the latter as the owner of the wood and collected the purchase money for it. At the close of the evidence the court non-suited the plaintiff.*

BECK, C. J.: It is conceded by the parties to this cause that the man Sargeant, who procured the shipment of the wood from the plaintiff, Miller, to the defendant, Hallock, was a swindler, and that both plaintiff and defendant acted in good faith. Plaintiff's counsel contends that the plaintiff is entitled to compensation from Hallock for his wood, because it was neither sold nor delivered to Sargeant, but shipped to, received by, and converted to the use of the said defendant. In support of this theory, counsel cite the following cases, which are clearly analogous to this case, so far as the facts are concerned, and which seem to sustain the rule of liability contended for. *Hamet v. Letcher*, 37 Ohio St. 356; *Barker v. Dinsmore*, 72 Pa. St. 427; *Klein v. Seibold*, 89 Ill. 540; *Barnard v. Campbell*, 55 N. Y. 457; *Moody v. Blake*, 117 Mass. 23.

The theory of the defense, however, is unanswerable so far as the present action is concerned. It is that the complaint counts upon a contract for the sale of the wood, alleged to have been entered into between the plaintiff and the defendant, whereas the proof wholly failed to sustain the allegation. The cause and character of the cases above cited were wholly different from the action instituted in this case. The former were actions to recover back the specific property which had been fraudulently obtained from the owners, or, where the property itself could not be recovered, to recover the value thereof from the persons who had converted it to their own uses. Here the action brought is upon an alleged contract entered into by the parties specifying the quantity of wood to be delivered by the plaintiff, and the price to be paid therefor by the defendant. No such contract having been made, of course it could not be proved, and the court was compelled to grant a non-suit. There was a fatal variance between the allegations of the complaint and the proofs. In such a case it is not enough that the evidence of the plaintiff show a case that calls for some relief. To entitle him to judgment he must show himself entitled to the relief called for by the facts stated in his complaint. As stated

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by the supreme court of California, in *Mondran v. Goux*, 51 Cal. 151: "The rule is well settled that the plaintiff must recover, if at all, upon the cause of action set out in his complaint and not upon some other which may be developed by the proofs."

A cause of action is a wrong committed or threatened. It may consist of the wrongful conversion of property, or of the non-performance of an agreement. In one case the cause of action would sound in tort, the other in contract; and, while the relief sought might relate to the same subject-matter, yet proof of facts sufficient to sustain the action for the tort, would be insufficient to sustain the action for the non-performance of the agreement, for the reason that the *probata* would not correspond with the *allegata*. The complaint would state one cause of action, every material averment of which might be controverted and put in issue by the answer of the defendant, while the facts proved would be foreign to the issues joined. That is just the case here presented. The complaint states a cause of action arising *ex contractu*, and each material averment thereof has been controverted and put in issue by the answer of the defendant, in the exercise of his legal rights. The proofs introduced and offered in evidence tended to establish a cause of action arising *ex delicto*. "A party can have no relief beyond what the averments of his pleadings entitle him to." The allegations of the complaint, the evidence, and the finding should correspond in legal intent. *Tucker v. Parks*, 7 Colo. 62, (1 Pac. 427); *Gregory v. Haworth*, 25 Cal. 656.

The judgment must be affirmed.

for def.

ANDERSON v. CASE.

28 Wis. 505. [1871.]

LYON, J.: The complaint charges that the defendants unlawfully seized and converted to their own use certain personal property therein described, in which the plaintiffs have an interest by virtue of a chattel mortgage thereon, executed by one J. D. Downer, to secure his indebtedness to them, to the amount of \$155.75. The answer of the defendants admit the taking of

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the property, and denies all the other allegations of the complaint. * * *

The testimony tends to show that the defendants shipped and sold the hops with the consent and by the request of the plaintiffs.

Before the public sale of the balance of the property, the parties entered into a written agreement relative to the proceeds of the sale thereof, which the circuit court held operated as a waiver of the alleged tortious taking of the property affected by it. This ruling of the circuit court, being in favor of the respondents, is not before us for review on this appeal.

erroneous instruction { The circuit judge instructed the jury, in substance, that if, after the defendants seized the hops, the plaintiff consented that they might ship and sell them, such a consent was a waiver of the wrongful taking, and the only remedy of the plaintiffs in such case would be an action for money had and received to recover the proceeds of the sale thereof. But this instruction was given with the following qualification: "The force and effect of such consent, if any was given, would depend very much upon the plaintiffs' understanding of the defendants' claim. If they understood that the defendants considered their claim to be subject and secondary to the plaintiffs' claim, and that the proceeds, by whomsoever collected, would be divided according to such respective rights, a consent under such circumstances ought not to be a waiver of the wrongful taking."

The plaintiffs had a verdict and judgment for the amount of their mortgaged property; and the defendants appeal from such judgment.

The action is for the unlawful conversion of the property described in the complaint. Before the adoption of the code, it would have been an action of trover. If the plaintiffs consented that the defendants should ship and sell the hops, then clearly there was no conversion, of the hops by the defendants, and no action of trover can be maintained therefor. The circuit judge so instructed the jury, and instructed them correctly. But the qualification to that instruction above stated we think is erroneous. We are unable to see how any misunderstanding between the parties as to their respective rights in the proceeds of the sale, or any misapprehension by the plaintiffs of the views of the defendants on the subject, not caused by the fraud of defendants, can effect such consent or weaken the

force of it. If the plaintiffs gave such consent, and it was important to them to know, before doing so, what the views of the defendants were, as to which mortgage had priority, and as to which party was entitled to be first paid out of the proceeds of the sale, they should have ascertained, before consenting to the sale, what those views were. And it cannot weaken or change the legal effect of such consent (the defendants being guilty of no fraud), if such consent was given without knowledge of the views of the defendants in that behalf, or under a misapprehension of those views. In either case it must be held that the consent of the plaintiffs to the sale, if given, operated as a waiver of the alleged tort; and in such case there could not have been a wrongful conversion of the hops.

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It is very evident that this objectionable instruction may have misled the jury. The jury may have found that the plaintiffs consented to the sale, and yet, under this instruction, if they also found that the plaintiffs gave such consent supposing that the defendants conceded the priority of their mortgage, the verdict must necessarily have been for the plaintiffs.

The plaintiffs contend, however, that although they have failed to establish their right to recover in this form of action for the conversion of the property, they have proved their right to recover the proceeds of the sale thereof in an action for money had and received, and that therefore the verdict and the judgment should not be disturbed.

The rule on this subject is, that where the case has been tried on the merits and substantial justice done between the parties, the verdict will not be set aside upon a question of form only, or upon some merely technical objection to the form of the action. 3 Graham and Waterman on New Trials, chap. XIV, sec. IX, and cases cited.

We think that an application of this rule to the present case will not save this verdict and judgment. The distinction between an action for the wrongful conversion of property, and an action for money had and received, is not merely technical or formal, but is a substantial one. The former is an action *ex delicto*, the latter *ex contractu*. In the one execution goes against the body, in the other, against the property only, of the defendant. The defendants in this action are liable to be imprisoned by virtue of an execution issued upon the judgment

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against them, while they would not be so liable were this an action for money had and received.

It is believed that no case can be found which attempts to ignore this vital distinction between those actions, or to deal with it as merely a formal or a technical matter. Certainly the learned counsel for the plaintiffs has not referred us to such a case.

We find no other error in the instructions which were given to the jury by the circuit judge. But for the error aforesaid, we think that there should be a new trial.

By the court: Judgment reversed, and a venire *de novo* awarded.

for def.

GALVIN v. MAC MINING CO.

14 Mon. 508. [1894.]

Action by Patrick Galvin against the Mac Mining & Milling Co., to recover for shares of stock sold to defendant. From a judgment for the plaintiff the defendant appeals.

Per Curiam. In this action plaintiff alleges sale and delivery by him, and purchase by defendant, of 7,468 shares of the capital stock of the defendant company, of the reasonable value of \$2,340.40, but that defendant has failed to make payment therefor; wherefore judgment is demanded for recovery of that sum. * * *

As to the first cause of action, for the recovery of the reasonable value of said stock, it appears that the plaintiff relied upon the fact that defendant had tortiously assumed, held, and converted said stock to his own use, and therefore plaintiff alleges purchase thereof by defendant, on the theory that he could waive the tort, and sue as upon contract for purchase. Defendant specially denied every allegation of the plaintiff's complaint relating to the sale and purchase of said stock. It was developed on the trial that said stock had been placed in the custody of defendant's secretary, with an assignment indorsed thereon, transferring the same to A. McLain, under the condition that the same, with other stock, might be purchased by the latter on or before a certain date fixed, on payment of a certain sum per share. That, such arrangement having ex-

*At common law Sale & promise in general
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recover by proving a quasi-contract. We*

pired, or been entirely revoked, leaving plaintiff's stock in the possession of the secretary of said company, subject to plaintiff's withdrawal or control, the plaintiff went to the secretary of defendant, and obtained his shares of stock, and indorsed thereon an assignment thereof, to D. Galvin, and left the same in the hands of the said secretary, explaining to him that the plaintiff was about to borrow a sum of money from D. Galvin, and proposed to assign and place said stock as a security for such loan. That he expected D. Galvin to arrive on a train, and consummate the loan and delivery of the security, and, in order to facilitate the transaction, as D. Galvin would have but a few moments to devote thereto, plaintiff had made this indorsement of assignment in advance of consummating such loan. That, as appears to be conceded, the loan in question was not consummated at all, and thereafter plaintiff called upon the secretary of the defendant, and sought to obtain possession of his shares of stock, but defendant's secretary, as appears, did not deliver the same, saying there would be some new blank certificates of stock in possession of the company in a few days, and that when the same arrived he would issue the plaintiff a new, clean certificate, representing his shares, in lieu of the old ones, which had been indorsed by the assignments above mentioned. Being agreeable to that suggestion, it appears that the plaintiff left his stock in the custody of the secretary for some time; and, as appears from the testimony of plaintiff, in the meantime said secretary personally sought to purchase said stock from the plaintiff, but such purchase was not effected. That after said certificates of stock had remained in the possession of said secretary for some time, plaintiff demanded the delivery thereof to him, but the secretary refused to deliver the same to the plaintiff, saying: "You have no stock in this company." On this state of facts, the plaintiff based his right to recover from the defendant the reasonable value of said stock; and defendant appears to have undertaken to defend and justify the action of its secretary on the ground that, the plaintiff having made said indorsements on the certificates in contemplation of transferring them to D. Galvin as a security for a loan, the secretary was justified in withholding said certificates of stock from plaintiff until D. Galvin reassigned them, or ordered their delivery to the plaintiff. On this theory of defense the action was tried, and instructions were given to the jury, and

the jury found against the defendant, in effect finding that its attempted defense or justification of its secretary's action was not well founded. Considering the theory of defense, and the evidence introduced in the action, we think the verdict of the jury is well supported. * * *

The point is raised by the appellant that there is a fatal variance between the proof and the allegations of the complaint, because the complaint alleges a sale of personal property described, and seeks to recover the reasonable value thereof, but the proof shows a tortious taking and conversion. The complaint is in the nature of assumpsit upon contract of sale and purchase, but the proof discloses a tortious assumption, detention, and unwarranted refusal to deliver said stock to plaintiff on his demand therefor; and these facts, together with the implication which the law draws therefrom, are relied upon to support the complaint alleging a sale. No variance can be maintained on such a situation. The authorities at common law, and those also relating to code procedure and remedies, hold that a declaration in assumpsit is supported by proof of the wrongful taking and conversion of personal property; but there is a line of cases which confines the right of election to waive the tort and sue and recover the value of the goods converted as if sold to the wrongful taker to cases where the latter had himself disposed of the property. This distinction has received very careful consideration and extended discussion by courts of last resort, and we think the great weight of reason and authority—especially of decisions under the reformed procedure—disregard that distinction as immaterial in cases where the owner of the goods sues to recover the reasonable value thereof, on the very proper and rightful assumption that the taker proposed, not to take the same without compensation to the owner, but to pay him the reasonable value thereof. If, however, the action was not for the reasonable value alone, but to recover for money had and received to the use of the owner by the wrongful taker through the sale of the goods, the plaintiff ought certainly to allege and prove the sale and amount received, because that shifts the measure for accounting from that of the reasonable value to the proceeds actually received by the wrongful taker through the sale of the goods. Bliss, Code Pl. 2d. Edition, §§ 13, 153. Pom. Rem. & Rem. Rights, §§ 567-573 and cases cited.

It is also urged by the appellant that the evidence is insuffi-

cient to support the verdict, because there is no evidence showing a sale by defendant of the property converted. This not being an action for money had and received by the defendant through the sale of goods wrongfully taken from the plaintiff, and it not being necessary to allege a sale, the point that the verdict is not supported because of want of proof of sale is not available in this action, for the reasons just shown. * * *

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Judgment affirmed.

for plain.

X HUSTON v. TYLER.

140 Mo. 252. [1897.]

SHERWOOD, J.: Action for the sum of \$2,500. The nature of the action best appears from the petition, which, omitting caption, etc., is the following:

"That the defendant was at the time hereinafter mentioned, and now is engaged at the said city of St. Joseph, in the business of obtaining loans of money for others on their promissory notes, and that the plaintiff well knew him to be engaged in said business; that the defendant at said city, on the 8th day of April 1892, prosecuting the business aforesaid*, entered into a contract and agreement with the plaintiff by which the latter agreed to loan twenty-five hundred dollars upon the promissory note of the following parties, to-wit, Thos. M. Smith, Pat Curtin, Phillip Weckerlin, and Jane E. Smith, which said note the defendant undertook and agreed to procure and deliver to the plaintiff; that thereafter the defendant presented and delivered to the plaintiff a promissory note for the sum of twenty-five hundred dollars, purporting to be signed by all of said parties, and represented to the plaintiff that it was the note agreed upon between them; that plaintiff believed defendant's representation to be true, and relying thereon and being induced thereby, he loaned the sum of twenty-five hundred dollars upon said note and delivered said sum to the defendant and received said note; that the said note was not in fact signed by any of the parties whose names appear signed thereto, except Thomas M. Smith; that on the contrary, the signatures of all the other parties to said note were forged thereto; that the said Thomas

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Smith was at all times herein mentioned and is now insolvent; that payment of said note has been demanded of said Smith, and all the other parties whose names appear signed thereto, and payment has been refused; that no part of the said note, principal or interest, has been paid; that the plaintiff has tendered the said note to defendant, and has demanded of him payment of said sum of twenty-five hundred dollars, with interest thereon; which has been refused by the defendant; that the plaintiff now tenders said note into court for the use of the defendant. Wherefore the plaintiff prays judgment against the defendant for the sum of twenty-five hundred dollars, with interest thereon at the rate of six per cent per annum from the eighth day of April, 1892."

The answer of defendant consisted, in substance, of a general denial. * * *

The evidence on the part of the plaintiff himself tended to show that while he was in his office on the sixth or seventh of April, 1892, he received a message over the telephone from defendant asking if he would loan \$2,500 for three months on the following names: Thomas M. Smith, Pat Curtin, Philip Weckerlin, and Jane Smith. Defendant being asked by plaintiff if they (the above named parties) would make a good note, replied it would be A1 or gilt edged, or something of that kind, but that plaintiff had better investigate the solvency for himself. On investigating plaintiff ascertained that though Thomas Smith had nothing, yet the others were large property owners, etc. Plaintiff then called defendant by telephone, and told him he would take the loan, when defendant replied, "I will get up the note, or get the note and bring it to you."

On the morning the note bears date, defendant came into plaintiff's office, and said, "Here's your note, or the note; I want my money, or the money." That thereupon plaintiff asked to whom the check for the amount was to be given, when defendant replied: "Myself; it is to be in my name;" whereupon plaintiff said, "That is all right; you are good to me for the amount," and drew a check for \$2,500, payable to defendant, handed it to him and received in return from defendant a note for a like sum, due in three months, on which note were the names which had been mentioned over the telephone. That defendant did not state to plaintiff for whom he was obtaining the money. But plaintiff did not suppose the defendant was

getting the money for himself, but supposed defendant was getting the money for those whose names were on the note.

When the note fell due it was not met, and it was ascertained that the names of all on it but Thomas Smith's were forgeries; and it was admitted at the trial on the part of plaintiff that in all of defendant's transactions connected with the note, defendant acted in good faith, and without knowledge of the non-genuineness of the signatures aforesaid. * * *

It further appeared in evidence that defendant, on receipt of the check, took out \$150 for his commission, and turned over, by check, the residue to Tom Smith.

The foregoing is a sufficient statement of the evidence for the purposes of the present occasion. On the conclusion of the testimony, the court gave the jury a peremptory instruction to find for the plaintiff the amount of the note with interest at six per cent from its date, and a verdict in accordance with this instruction was returned.

1. Chitty says: "An inducement in an action of *assumpsit* is in the nature of a preamble, stating the circumstances under which the contract was made, or to which the consideration has reference." 1 Chitty Pl. (16th Am. Ed.) *296; Ibid, *111 *et seq*; Bliss, Code Pl. (3d ed.) secs. 149, 150; Andrews Stephens' Pl., sec. 53; 5 Am. & Eng. Enc. of Law, 355. Under these authorities it will readily be seen that the "matter of inducement" in this instance begins at the initial statement as quoted from the petition, and ends at the asterisk as marked after the word "aforesaid." The "gist" of the action manifestly lies in the allegation that defendant undertook and agreed to procure and deliver to plaintiff a promissory note of certain named parties, for the sum of \$2,500. Were this an action at common law it would be denominated "*express assumpsit*." 1 Wait's Act. and Def., 373. And notwithstanding the common law forms have been abolished, their substance in great part remains, and this is still true of the distinction between mere matter of inducement and the "gist" of the action or matter of substance. Bliss, Code Pl., sec. 149.

So that from these considerations it must be evident that plaintiff's contention that "the petition in this case is *not based* upon an agreement by Tyler to procure a note signed by the parties named," and that "the agreement is set out by way of inducement in connection with all the other facts connected with

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the transaction," cannot prevail. And even if it be conceded that the words from the asterisk downwards, constitute only matter of inducement, still plaintiff is in no better plight, because the allegation is certainly material to plaintiff's recovery; and on this point Chitty says: "In general, however, every allegation in any inducement, which is material and not impertinent and foreign to the cause, and which consequently cannot be rejected as surplusage, must be proved as alleged, and a variance would be fatal." 1 Chitty, Pl. *299.

We regard, however, the allegation already noted, not as mere matter of inducement, but as the *gravamen* of plaintiff's action, and without proof of it, and there was none, he was not entitled to recover in this case.

2. Plaintiff having elected to sue on an alleged express contract on the part of defendant to procure and deliver to plaintiff a promissory note for \$2,500, etc., cannot enlarge his cause and basis of action by resorting to the general words of his petition, but will be confined to the act specifically assigned in his petition as his ground of action. *Schneider v. Railroad*, 75 Mo. 295; *Waldhier v. Railroad*, 71 Mo. 514; *Fuehs v. City*, 34 S. W. loc. cit. 513. And plaintiff having declared upon what is an express contract or warranty as to the genuineness of certain signatures, he was thereby precluded from relying on an implied warranty to the same effect. *International Co. v. Smith*, 17 Mo. App. 264; *Deming v. Foster*, 42 N. H. 175; *McGraw v. Fletcher*, 35 Mich. 104; *Baldwin v. Van Deusen*, 37 N. Y. 487.

Nothing is better settled in this State than that a party will not be permitted to sue upon one cause of action and recover upon another. *Clements v. Yates*, 69 Mo. 623, and cases cited; *Carson v. Cummings*, Ib. 325; *Sumner v. Rogers*, 90 Mo. 324. In the last case cited, it was ruled that though our code speaks of every suit brought thereunder as a "civil action," yet this extends only to the form of the action, and not to its substance. On a subsequent occasion it was ascertained that the same view had been expressed in a more amplified way by the court of appeals of New York, to the effect that notwithstanding a party may move to have the pleading of his adversary made more definite and certain, yet he is not bound to do this; that is the primary duty of the party drawing the pleading, and the latter cannot cast that onus on his opponent by failing

to perform his own duty in the first instance, and that duty consists in expressing his meaning clearly and unmistakably. Snyder v. Free, 114 Mo. 360; Clark v. Dillon, 97 N. Y. 370. See, also, Young v. Schofield, 34 S. W. Rep. loc. cit. 499.

In short, the cases above cited recognize the doctrine that the "fundamental requirements" of good pleading are and must remain the same, whether under code or at common law; that is to say, a pleading must be so drawn as to tender a definite issue or issues, and not have the adversary to grope in the dark as to what the meaning of the pleading is; "this is no more allowable now than formerly." Clark v. Dillon, supra. In the case at bar, therefore, it was misleading in pleading plaintiff's cause of action to plead an express contract, and then on the trial rely upon that as a matter of inducement, and also on "all the other facts connected with the transaction," whether such other facts accorded with the theory of an express contract or warranty or not. * * *

Because of the errors mentioned, we reverse the judgment and remand the cause. All concur.

for def.

FARRON v. SHERWOOD

17 N. Y. 227. [1858.]

Appeal from the superior court of Buffalo. The complaint was: "First. That the defendant is indebted to the plaintiff in the sum of fourteen hundred and twenty-nine and 54/100 dollars, for work, labor and services done and performed for the defendant, at his special instance and request, at the city of Buffalo, by the plaintiff and his servants and agents, at divers times between the 8th day of May, 1852, and the commencement of this action, in and about quarrying, dressing, preparing, delivering, putting together and erecting certain building stones, in and about defendant's dwelling on Main street, in said city of Buffalo, and that said work, labor and services were reasonably worth the sum of fourteen hundred and seventy-nine and 54/100 dollars; and that the defendant has not paid the plaintiff the said sum nor any part thereof, but has hitherto wholly neglected and refused so to do. Second. And, for a second cause of action against the defendant, the

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plaintiff says that the defendant is indebted to him in the sum of thirty-eight and 4/100 dollars, for certain dressed building stones, before the commencement of this action sold and delivered by the plaintiff to the defendant, at the city of Buffalo, at defendant's special instance and request; that the said building stones were reasonably worth the sum of thirty-eight and 4/100 dollars; and that the defendant has not paid the plaintiff the said sum, or any part thereof; but has hitherto wholly neglected and refused so to do. Wherefore the plaintiff demands judgment against the defendant for the sum of fifteen hundred and seventeen dollars and sixty-three cents, besides the costs of this action." The defendant, by his answer, denied each and every allegation of the complaint. The action was tried before a referee. Upon the trial, the plaintiff produced several witnesses, who proved the work, labor, and materials specified in a bill of particulars, furnished the defendant, of the plaintiff's claim, and the value of the different items; and then rested. Whereupon the defendant proved payment of \$1,002, and then proved and read in evidence a special contract between him and the plaintiff, under which the labor, except sixty-four days' labor, worth \$2 per day, and altering a buttress, worth \$6 was done. Upon the proof and the pleadings the case was submitted to the referee, "the defendant then and there insisting that the plaintiff could not recover, but for the extra work, except upon the special contract, which he had neither stated in the complaint nor proved;" but the referee overruled the objection; to which the defendant excepted. The referee reported in favor of the plaintiff for \$299.55. Judgment having been entered on the report, the defendant appealed to the general term of the superior court, by which the judgment was affirmed; and the defendant thereupon appealed to this court.

STRONG, J.: The first point made by the counsel for the appellant is, that for the portion of the work and labor done under the special contract, the remedy of the plaintiff was upon that contract; and that he was not entitled to recover upon the common counts. It is necessarily assumed in support of this position that the contract is the cause of action for that work and labor; and if that be so, the position is correct; that cause of action not being stated in the complaint, and the objection being taken at the trial, the referee erred in allowing the part of the plaintiff's claim in question. But the assumption is wholly un-

warranted in the case. It was not objected at the trial that the contract had not been fully performed on the part of the plaintiff; no question was raised, and, so far as appears, there was no ground for any question on that subject. Hence it must be deemed that the plaintiff had done all that was incumbent on him to do, and that nothing remained to be done by the contract but the payment of the stipulated price by the defendant.

The case is therefore within the settled rule that where there is a special agreement and the plaintiff has performed on his part, the law raises a duty on the part of the defendant to pay the price agreed upon, and the plaintiff may count either on this implied assumpsit or on the express agreement. A new cause of action upon such performance arises from this legal duty, in like manner as if the act done had been done upon a general request without an express agreement. (Lawes' Pl. 5; Jewel v. Schroepel, 4 Cow. 564; Feeter v. Heath, 11 Wend, 484; Mead v. Degolyer, 16 id. 637, 638; Clark v. Fairchild, 22 id. 576.) This rule is not affected by the code; the plaintiff might, as he has done, rest his action on the legal duty; and his complaint is adapted to and contains every necessary element of that cause of action. It was not necessary to state in terms a promise to pay; it was sufficient to state facts showing the duty from which the law implies a promise; that complies with the requirement that facts must be stated constituting the cause of action. (Allen v. Patterson, 3 Seld. 476.)

The defendant was not precluded by the form of the complaint from setting up and availing himself of any defence he had under the contract.

All the judges concurring.

for plain.
Judgment affirmed.* ✓

But this was no variance, since upon performance by plaintiff a legal duty arises requiring defendant to pay; & plain. can sue in general assumpsit.

GREENTREE v. ROSENSTOCK.

61 N. Y. 583. [1875.]

Appeal from the judgment of the General Term of the Superior Court of the City of New York, affirming a judgment in favor of plaintiff entered upon the report of a referee; and, also, from an order affirming an order denying a motion for a new trial on the ground of newly discovered evidence.

*Accord, Moore v. Gans, 113 Mo. 98.

summons The summons in the action was for relief. The complaint set forth that, in the month of December, 1858, one Nathan Hofflin, at San Francisco, California, appointed the defendant, who then resided in that city, agent to sell for him certain property in California, then belonging to him, and to collect certain claims owing to him from persons in the state, and that the defendant accepted the trust and agreed duly to account to Hofflin for the proceeds of the sales and collections made by him as such agent. It was further alleged that the defendant, as such agent, had received for the said Nathan Hofflin the sum of \$4,153.75, in the gold coin of the United States, and had failed to account for the same to Hofflin, but had converted the same to his own use. That the said Nathan Hofflin, for value, assigned his claim for said funds, or the proceeds thereof, to the plaintiff; and that, though requested by the plaintiff since the assignment, the defendant refused to pay him the gold coin or its proceeds, and that by reason thereof he had sustained damage, etc.

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The answer admitted the defendant's appointment as agent, and the receipt by him, in that character, of the money set forth in the complaint, but denied the assignment. * * *

DWIGHT, C.: The appeal from the order denying the new trial cannot be entertained in this court.

On the appeal from the judgment, the defendant claims that the referee should have dismissed the complaint, on the ground that, as the summons is for relief, and, according to his view, the action is in tort for the conversion of gold, and the claim is for \$10,000 damages, consequent on the tort, the plaintiff cannot recover on contract merely for a debt due.

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(semble)

I do not think that the present action is framed in tort. The allegations are all such as would be properly made if one sought to recover from his agent on an accounting. The complaint alleges the employment of the defendant, his receipt of Hofflin's money, the failure of the defendant to account for the money or the proceeds, or to pay the same to Hofflin, and his refusal to pay the money or the proceeds to the plaintiff, though requested to do so. These allegations plainly are framed on the view that the defendant was bound to make over not specific money, but only to give that or its proceeds, or in other words, simply to account, in his character of agent. An action to hold him upon this liability is an

ordinary action upon contract. It is true that, in connection with these statements, it is asserted that the defendant "converted the property to his own use." This is, however, merely surplusage. Under all the circumstances, it is an immaterial allegation. It is a mere deduction from the statement of fact, and in the connection in which it is used, it is not traversable. *Conaughty v. Nichols* (42 N. Y., 83) is in point. The complaint in that case was framed on the theory of an agency, and there were sufficient allegations to show the defendant's duty to account. Then there followed a statement that the defendant refused to pay, and had "converted the plaintiff's property to his own use." The court held that if the words "converted the same to his own use," had been omitted there would have been a complete cause of action upon contract. These words were unnecessary to be stated, and superfluous. Their insertion, accordingly, had no effect upon the cause of action, and the plaintiff was allowed to recover. I think that this case was rightly decided, though it has met with some criticism.

The true theory of that case is that the words as there used were a mere legal conclusion, drawn by the pleader from the facts which he had averred. The pleader had stated facts from which that conclusion did not logically follow. It is not legally true that a commission merchant who has sold goods and received the price does, by retaining the price, convert it to his own use, so as to make him liable in an action of trover. (*Walter v. Bennett*, 16 N. Y., 250.) Had it been the correct exposition of the law that such retention is truly a conversion, and had the allegations been framed on such a theory, I concede that the plaintiff could not, upon the authorities, recover upon proof which showed the defendant to be liable upon a contract. (*Walter v. Bennett*, supra.) That, however, is not this case. *Conaughty v. Nichols*, considered from this point of view, is perfectly sound, and only maintains that an action upon a contract does not cease to be such because it contains an incorrect legal conclusion having the aspect of a tort. See also *Ledwich v. McKim* (53 N. Y., 307-316), where the principle in *Conaughty v. Nichols* is approved.

This view in no respect conflicts with *Ross v. Mather* (51 N. Y., 108). That was an entirely different case. The complaint in that case contained all the elements of a complaint for fraud. The averments were not conclusions of law, as in

allegation of conversion may be treated as surplusage

or better, as a legal conclusion in either case not traversable

mere incorrect legal conclusion of tort liability does not change a contract action to one in tort.

the allegations of conversion in *Conaughty v. Nichols*, and in the case at bar, but statements of specific facts. There was, among other things, a positive averment of a false statement, and of knowledge, on the part of the defendant, of its falsity, and of the fact that the purchaser was fraudulently deceived. These statements were absolutely necessary to the action, considered as an action of tort. They were out of place in an action on the contract. The court held that the plaintiff could only recover on the theory of a fraud. A case so different in its facts is no authority for overruling *Conaughty v. Nichols*. The cases may well stand together. The court, in *Ross v. Mather*, did not intend to go counter to that case (page 112). It also holds that the fact that the summons is for relief is immaterial. The same remark must be made as to the prayer for damages. The present case is put distinctly on the ground that no other action would lie against the defendant, except one upon contract. (*Walter v. Bennett*, 16 N. Y., 250; *Weymouth v. Boyer*, 1 Ves. Jr., 416; *Harris v. Schultz*, 40 Barb., 315.) The allegations are sufficient to sustain that view, and the statement of a conversion is an erroneous legal conclusion from the facts averred, in its nature not traversable, and doing no possible harm to the defendant.

Judgment affirmed.

for plain.

CARBONDALE INVESTMENT COMPANY v. BURDICK.

67 Kan. 329. [1903.]

(mortgage) POLLOCK, J.: It is difficult to ascertain the exact nature and scope of this action. It was brought by I. D. Burdick and H. W. Burdick against the Carbondale Investment Company, based upon the following facts: The investment company was the owner of an 80-acre tract of land near the city of Carbondale, upon which there was discovered mineral springs. The investment company desired to sell this land, and plaintiffs wishing to purchase for the purpose of utilizing these springs, developing the property, and platting it into an addition to the city of Carbondale, but being without means to pay for the same, the property was conveyed to the plaintiffs by the investment company for the consideration of \$4,672, and a

mortgage to secure the entire purchase price was taken upon the property, under an agreement conditioned, among other things, that plaintiffs would plat the property into lots, blocks, streets, alleys, driveways, etc.; would plant shade and ornamental trees, beautify the grounds, and advertise the property for sale; would refrain from fencing the land or converting it into a farm; and that the investment company would release any lot or lots sold from the lien of the mortgage upon payment of the sum of \$12 per lot containing 3,750 square feet.

It is alleged in the petition that the plaintiffs took possession of the property, caused a plat of the ground to be prepared and filed, at a cost of \$200; planted shade trees, and ornamented and improved the ground at a further expense of \$1,500; and that they expended the further sum of \$500 in time and money in advertising the property for sale, and sold a large number of lots to divers persons, and tendered the investment company the sum of \$12 per lot, and demanded a release of such lots from the lien of the mortgage, which demand was refused by the defendant. That defendant wholly failed and refused to comply with its contract, to release the lots when sold.

It is further alleged, as follows: "That the defendant then wrongfully undertook, contrived and designed to wantonly, maliciously, and wrongfully stop the sale of all lots whatever by plaintiffs, and prevent them from realizing any sum therefrom to pay said mortgage, and to annoy, obstruct and prevent plaintiffs from performing and carrying out said contract on their part, and to deprive plaintiffs of the benefit of their bargain, and in pursuance of said wrongful purpose refused the releases, instituted the vexatious and unwarranted suits, and did the wrongful acts hereafter alleged, that is to say: At the time of each such request to release the lots so sold by these plaintiffs said defendant, in direct violation of its agreement, and when these plaintiffs were in no default, refused to release a single lot, and would not do so upon proper, timely, and sufficient tender, and the defendant from that time continuously has refused to release said lots; and the defendant having accepted and received the first year's interest on the note and mortgage, which was paid three days after the time it became due, the defendant and its officers having consented that there might be such delay, at a meeting of its board of

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directors received and accepted such payment, and by resolution divided such payment into dividends for the stockholders, and then at the same meeting directed and authorized suit to be brought against these plaintiffs for the foreclosure of the said mortgage, and immediately thereafter, about April 18, 1890, in pursuance of said direction, a suit for the foreclosure of said mortgage was instituted against these plaintiffs on the ground of non-payment of said interest and taxes (the defendant then well knowing that the plaintiffs had previously paid such taxes), and said suit was continued in court until August, 1891, and the defendant was finally defeated in that suit for the aforesaid reasons."

It is also alleged defendant instituted an injunction suit against plaintiffs to restrain plaintiffs from pasturing the property, which suit finally terminated in favor of the plaintiffs, all of which damaged the plaintiffs in the sum of \$20,000. To this petition, defendant interposed, by way of answer, a general denial. The case was tried to the court and a jury, the jury returning a general verdict of \$10,500, together with interest amounting to \$17,747.10; also answers to special questions submitted. * * *

Plaintiffs having remitted the interest, judgment was entered on the verdict. Defendant bring error.

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From the allegations of the petition it is evident that a cause of action is stated for the breach of the contract made between the parties. It is also apparent the pleader placed much reliance upon the alleged wanton, wrongful, malicious, and premature bringing of the foreclosure action. No motion or demurrer was levelled at the petition. An examination of the record discloses ample evidence to support a judgment of damages, in some amount, for breach of contract, but the jury find the entire damages awarded plaintiffs to have been sustained as a result of the premature bringing of the foreclosure action. As a necessary consequence, all damages for the breach of the express covenants of the contract are thus eliminated from this controversy, and the entire judgment must rest alone upon a consideration of the nature of the cause of action for the wrong alleged to have been sustained by plaintiffs in the premature institution and prosecution of this foreclosure action. While, by provision of the Civil Code, the common law forms of action are expressly abolished, yet it is true and

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ever must remain true, in any orderly administration of justice, that the precise nature of the cause of action must be determined before the rules of law applicable thereto can be ascertained and applied. Any other method of procedure must of necessity lead to inextricable confusion. As well, and with as much propriety, might a physician attempt the treatment of a patient, without a diagnosis and knowledge of the ailment from which the patient suffers. As was held by the court in *Grentner v. Fehrenschild*, 64 Kan., 764 (68 Pac. 619), "The plaintiff must frame his petition upon a distinct and definite theory, and upon that theory the facts alleged must state a good cause of action." If the petition is not drawn upon a single and definite theory, or there is such a confusion of theories alleged that the court cannot determine from the general scope of the petition upon which of the several theories a recovery is sought, it is insufficient."

What legal effect may be given the allegations in reference to the foreclosure action? Do they form a part of the cause of action for breach of contract, or must they be regarded as introducing a separate cause of action? Counsel for the respective parties do not agree upon this question. The theory of counsel for plaintiff in error, at least in this court, is that the allegations in relation to the premature attempt to foreclose the mortgage are separate and apart from the action for breach of the contract, and must be regarded as an action for "slander of title." We are not inclined to adopt this theory as to the nature of the action. Mr. Newell, in his work on *Slander and Libel* (2d ed., p. 203), defines the right of action for slander of title to be in case "anyone who falsely and maliciously defames the title of property, either real or personal, of another, and thereby causes him some special or pecuniary damage or loss." As defendant at all times conceded the absolute title and right of possession of the property in question to be in the plaintiffs, subject to the lien of its mortgage, and did not assert to the contrary, no question of title or the defamation of plaintiff's title is alleged against defendant. The theory of counsel for defendants in error is, the premature bringing of the foreclosure action constituted a breach of the implied terms of the contract between the parties, and hence the entire action is one for damages for breach of contract. But as the right to a timely foreclosure of the mort-

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gage, in case of default was not contracted against, and as a premature attempt at foreclosure could not have been anticipated, the contract being silent, it cannot be thought the question of a foreclosure of the mortgage was in contemplation of the parties at the time of the making of the contract. The refusal of the defendant to execute the releases for the lots sold, as covenanted in the contract, and as found by the jury from the evidence, constitute an express violation of the contract, for which breach of the contract, if damage ensued, a cause of action accrued to plaintiffs, but such damages cannot be enhanced by the intent with which defendant committed the breach. In *Ice Co. v. Wylie*, 65 Kan., 104 (68 Pac. 1087), it is said: "The intent with which the contract was violated did not furnish a cause of action, but the fact of the breach, disassociated from the reasons for it. The wilfulness of a party in refusing to carry out a contract does not in any way change the rule of damages. It is the same whether the breach results from mistake, accident, or inability to perform it, or whether it be wilful and malicious." 3 Par. Cont., 166; *Stranahan Co. v. Coit*, 55 Ohio St., 398-407 (45 N. E. 634).

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Therefore, if the wanton, malicious, wilful, and premature bringing of the foreclosure action as alleged in the petition is to perform any office or give rise to any cause of action or right to damages in this case, it must form the basis of an independent right of action, not flowing from the contract, but disassociated from a right of action on the contract, and must be governed and controlled by the rules of law applicable to such an action. From a consideration of the allegations of the petition we conclude the pleader had in mind and alleged, or attempted to allege, a cause of action for the "malicious prosecution of a civil action." The jury having determined the entire damage suffered by plaintiffs to have been occasioned by the premature prosecution of this foreclosure action, it only remains for us to determine whether the petition alleges sufficient facts to entitle the plaintiffs to a recovery for such action, and whether the proofs are sufficient to support the judgment rendered. Upon this theory of the case it is contended the allegation of damages found in the petition is general, and must be special. In this state, contrary to the rule in many jurisdictions, an action may be maintained for the "malicious prosecution of a civil action," where the defend-

ant in such prosecution alleges and shows he has sustained any damage over and above the taxable costs in the case. *Marbourg v. Smith*, 11 Kan., 554; 19 A. & E. Encycl. L. (2d ed.), 652. The facts necessary to be alleged and proven in order to maintain an action for the "malicious prosecution of a civil action" are the same as those required to sustain an action for the malicious prosecution of a criminal case. *Wilcox v. McKenzie*, 75 Ga., 73. In this case, before the plaintiffs can recover for the malicious prosecution of the foreclosure action, it is incumbent upon them to allege and prove the prosecution of the foreclosure action against them, ¹without probable cause, ²with malice, ³the termination of such action in favor of plaintiffs, and ⁴their damages; for such are the constituent elements of such an action. *Malone v. Murphy*, 2 Kan., 54; *Marbourg v. Smith*, supra; 19 A. & E. Encycl. L. (2d ed.), 652.

Applying these principles to the pleadings and evidence in the case at bar, it is very evident a reversal of the judgment must follow. While the petition alleges the foreclosure action to have been prematurely brought, and malicious, yet there is no averment of want of probable cause, and there is an entire absence of proof of malice and want of probable cause in the evidence.

follows the judgment must be reversed, and cause remanded for a new trial in accordance with this opinion. All the justices concurring.

for def.

GARTNER v. CORWINE. ← not good case

57 Ohio St. 246. [1897.]

WILLIAMS, J.: Suit was brought by Corwine against Gartner to recover damages for breach of warranty in the sale of a horse. The petition alleges, in addition to the warranty and its breach, that the defendant knew, at the time of the sale, that the animal was not what it was warranted to be. On a trial of the issues joined by a denial of the warranty and its breach, and of the defendant's knowledge that the warranty was false, the jury were instructed, in substance, that, to entitle the plaintiff to a verdict in the case, it was necessary for him to prove, by a pre-

Plaintiff has failed to either allege or prove a good cause of action for malicious prosecution, as he failed to allege or prove want of probable cause.

Action to recover for breach of express warranty in sale of a horse.

Plaintiff also alleges that defendant knew horse was not as warranted at time of sale.

ponderance of the evidence, that the defendant knew the warranty was false in some material particular, or had reason to believe it to be false. The judgment rendered on the verdict, which was for the defendant, was reversed for error in giving the foregoing instruction; and, upon the question concerning which the courts below entertained different opinions, the case has been ordered to be reported.

The contention of the counsel for the plaintiff in error appears to be that the effect of the averment charging the defendant with knowledge of the falsity of the warranty was to make the action one for deceit or fraud, and therefore proof of such knowledge was essential to plaintiff's right of recovery; otherwise the petition would include two inconsistent causes of action which could not be joined. The code permits the plaintiff to state the facts which constitute his cause of action; and when, upon any of the facts so stated, he is entitled to recover, he cannot be denied that right because he has alleged other facts that he is unable to prove. A warranty in a sale of chattel property is a part of the contract, and the warrantor is bound by it, and answerable in damages for its breach, though he may have honestly believed the article to be as warranted. But the representations of the seller may fall short of an express warranty, and yet may be such as induce the purchaser to rely upon them, and entitle him to redress against the seller if the latter knew they were false, or recklessly made them without reasonable ground for believing them to be true. And which of these phases of his case the purchaser may be able to sustain by proof can only be determined on the trial; but proof of either entitles him to relief. And it is competent, we think, for the plaintiff to state in his pleading all the facts of the transaction which enter into his right to recover, as he believes them to be, though they present different grounds of recovery, and admit of different modes or measures of relief, and to ultimately have that relief to which the allegations proved showed him entitled. The petition of the plaintiff alleges an express warranty of the horse, and a breach of that warranty, and his right to recover damages resulting from that breach was not affected by the allegation of the defendant's knowledge of the falsity of the warranty. The latter allegation did not, as counsel for the plaintiff in error contends, change the action to one exclusively for deceit, nor is it inconsistent with those upon the warranty.

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They may all be true. Whether there is more than one cause of action stated in the petition is a question upon which differences of opinion may exist. But it need not now be determined. If there are two—one for breach of the warranty, and the other for fraud, they grew out of the same transaction, and may properly be joined in the same petition; and, no motion having been made to require them to be separately stated, that objection to the petition, if it were open to it, was waived by answer. In favor of the view that there is but one cause of action stated, it may be said there was but a single transaction between the parties (the negotiations resulting in the sale of the horse); there was but one wrong of the defendant (the sale of an unsound animal as and for a sound one); and there is but one right of the plaintiff growing out of the wrong, and that is to have redress for the injury he sustained in consequence of it, and for which he can have but one recovery. And a statement of all the facts of the transaction, with a demand for the relief desired, as one cause of action, seems more in harmony with our reformed system of pleading than a repetition of them, which becomes necessary, in part at least, in their statement as separate causes of action. But, in either event, whether the petition states but one cause of action or two, the plaintiff, upon proof of the warranty, and that it was broken, to his damage, was entitled to a verdict, notwithstanding he failed to establish by proof the defendant's knowledge that the warranty was false; and, as this right was denied him by the instruction given to the jury, the reversal of the judgment for that reason was not error.

Judgment affirmed.

for plain.

Even if petition is double, the defect was waived by answering over. — "If we can treat the complaint as double, plaintiff can recover either a verdict or a judgment must be entered singly wherever possible, other reasonable construction is given. Is wrong in fact, & he should be held to his tort action" — 12 Ill. law. Court was wrong in allowing plain. to continue his petition as one of contract.

SUPERVISORS OF KEWAUNEE COUNTY v. DECKER.

Good law

30 Wis. 624. [1872.]

Action for the recovery of money alleged to belong to the county of Kewaunee, and to have been converted by defendant Decker to his own use, he being the clerk of the plaintiff board of supervisors. The opinion states the case. Defendant having demurred to the complaint for insufficiency, the demurrer was overruled, and defendant appealed.

action for money misappropriated by def. as clerk of plain.

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DIXON, C. J.: It would certainly be a most anomalous and hitherto unknown condition of the laws of pleading were it established that the plaintiff in a civil action could file and serve a complaint, the particular nature and object of which no one could tell, but which might and should be held good as a statement of two or three or more different and inconsistent causes of action, as one in tort, one upon money demand on contract, and one in equity, all combined or fused and moulded into one count or declaration, so that the defendant must await the accidents and events of trial, and until the plaintiff's proofs are all in, before being informed with any certainty or definiteness what he was called upon to meet. The proposition that a complaint, or any single count of it, may be so framed with a double, treble, or any number of aspects, looking to so many distinct and incongruous causes of action, in order to hit the exigencies of the plaintiff's case or any possible demands of his proofs at the trial, we must say, strikes us as something exceeding novel in the rules of pleading. We do not think it is the law, and, unless the legislature compels us by some new statutory regulation, shall hereafter be very slow to change this conclusion.

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Counsel for the defendant in this action suppose the complaint herein to be intended and to be one in trover, charging or seeking to charge the defendant with the wrongful conversion of certain moneys which came into his hands as a public officer, and which belonged to the plaintiff; and, acting upon such supposition, they have demurred to the complaint as not stating facts sufficient to constitute that cause of action. It would be unfair to say that the learned counsel for the plaintiff equivocate on the point, nor is it true that they take issue with the counsel for the defendant as to the nature of the complaint. They rather concede than otherwise that the complaint is and was intended to be one in tort for the conversion, but they at the same time insist that if it is not good as a complaint of that kind, it is sufficient as a complaint or count in an action for money had and received, and being sufficient for that purpose, they argue that the demurrer was properly overruled, and the order of the court below should be affirmed on that ground. In other words, their position is that it is a question now open to speculation and inquiry on this demurrer, whether, upon all or any of the facts stated in the complaint, taken collectively or

separately, or even by severing the allegations themselves, so as to eliminate or discard certain portions of them as surplusage, a cause of action of any kind is or can be made out, and, if it be found that it can, then the demurrer should be overruled. To show that the complaint may be upheld as one for money had and received for the use of the plaintiff, and the action considered as one of that kind, counsel gravely contend that the averments that the defendant made fraudulent representations, and acted falsely, fraudulently and wrongfully, in claiming and withholding the moneys, and that he converted the same, etc., may be disregarded and rejected as surplusage.

In support of this position, counsel cited several New York decisions, and some in this court, where, *after trial and judgment, or after issue had been taken upon the merits, or after the trial has commenced and the plaintiff's case is closed*, it has been held that such allegations may be disregarded. The decisions were in actions like the present and others involving a somewhat similar question under the circumstances above stated, and were made in favor of a good cause of action, proved or proposed to be, and which by a fair and reasonable interpretation of the pleadings could be said to be within the scope of them, or to be fairly mapped out and delineated by the averments, so that the defendant was apprised of the demand made against him, and of the facts relied upon to establish it. The great liberality of the code, and the broad powers of amendment conferred and enforced upon the courts under such circumstances are well known. It is declared that no variance between the allegation in a pleading and the proof shall be deemed material, unless it shall actually mislead the adverse party to his prejudice in maintaining his action or defense upon the merits, and that when the variance is not material, the court may direct the fact to be found in accordance with the evidence, or may order an immediate amendment without costs. Most liberal provision is also made for amendments in other respects, by adding to or taking from the pleadings before or after judgment in furtherance of justice. Where an answer is put in, it is provided that the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. And it is furthermore declared that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the sub-

Def. argues that averment of fraud, etc. may be treated as surplusage

Cases where plain. has been permitted to recover on a different cause of action from that stated in his complaint are all those in which the defect has been cured by trial and verdict on the merits of the case.

substantial rights of the adverse party, and that no judgment shall be reversed or affected by reason of such error or defect. These provisions, for the most part, if not entirely, relate to the proceedings in an action after issue joined on the merits, upon or after the trial, or after judgment on the merits, when the facts are made to appear and the substantial rights of the parties are shown. They are enacted in amplification and enlargement of the rules of the common law on the same subjects, by which it is well understood there were many defects, imperfections, and omissions, constituting fatal objections on demurrer, which were cured after issue joined, and a trial or verdict and judgment on the merits. The cases cited by the counsel are all of them manifestly such as fall within these provisions and rules, and none of them touch or have any bearing on the question or case here presented. No case arising upon demurrer to the complaint is cited, and it is believed none can be, holding any such doctrine as that contended for. Most of the cases were where no objection was taken until after issue was joined and trial had and judgment rendered on the merits, and then the objection was brought forward as a ground of reversal, and generally in the appellate court, that the plaintiff had declared in tort and recovered on contract, or vice versa, or had sued in equity and recovered judgment at law, or that equitable relief had been granted in an action commenced and tried as one on the law side of the court. In all the cases the objection had been waived by failure of the party to take it properly and in season, and under the liberal powers of amendment and curative provisions of the code, it was held that the proceedings or judgments, just in themselves, should not be disturbed upon points of mere form. Further or more particular comment upon the cases is deemed unnecessary. It suffices to repeat the references as found in the printed argument of the counsel: Barlow v. Scott, 24 N. Y., 40; Byxbie v. Wood, id. 607; Austin v. Rawdon, 44 N. Y., 63; Greason v. Keteltas, 17 id., 491; Emery v. Pease, 20 id., 62; Conaughty v. Nichols, 42 id., 83; Wright v. Hooker, 10 id., 51; Walter v. Bennett, 16 id., 250; Stroebe v. Fehl, 22 Wis., 347; Hopkins v. Gilman, id., 481; Tenney v. State Bank, 20 Wis., 152; Leonard v. Rogan, id. 540; Samuels v. Blanchard, 25 id. 329; Vilas v. Mason, id. 310, 328.

It thus appears that the authorities relied upon do not sanction the position, that a complaint in the first instance and

where challenged by demurrer, may be uncertain and ambulatory, purposely so made, now presenting one face to the court and now another, at the mere will of the pleader, so that it may be regarded as one in tort, or one on contract, or in equity as he is pleased to name it and the necessities of argument require, and if discovered to be good in any of the turns or phases which it may thus be made to assume, that it must be upheld in that aspect, as a proper and sufficient pleading by the court. As already observed, the opinion of the court is quite to the contrary. We have often held that the inherent and essential differences and peculiar properties of actions have not been destroyed, and from their very nature cannot be. *Howland v. Needham*, 10 Wis., 495, 498. These distinctions continuing, they must be regarded by the courts now as formerly, and now no more than then, except under the peculiar circumstances above noted, can anyone complaint or count, be made to subserve the purposes of two or more distinct and dissimilar causes of action at the option of the party presenting it. It cannot be "fish, flesh or fowl," according to the appetite of the attorney preparing the dish set before the court. If counsel disagree as to the nature of the action or purpose of the pleading, it is the province of the court to settle the dispute. It is a question when properly raised which cannot be left in doubt, and the court must determine with precision and certainty upon inspection of the pleading to what class of actions it belongs or was intended, whether of tort, upon contract, or in equity, and, if necessary or material, even the exact kind of it within the class must also be determined. See *Clark v. Langworthy*, 12 Wis., 441; and *Gillett v. Treganza*, 13 Wis., 472.

This is not only in harmony with the decisions above referred to, but with all the decisions of this court bearing upon the question, and we know of none elsewhere in conflict. It is in harmony with those decisions which have been made, that an application to amend should be denied, which proposes to entirely change the cause of action sued upon, or to introduce a new one of a different kind. *Newton v. Allis*, 12 Wis., 378; *Sweet v. Mitchell*, 15 id., 641, 664, and 19 id. 528; *Larkin v. Noonan*, 19 id., 82; *Stevens v. Brooks*, 23 id., 196. It is in harmony with the decision in *Scheunert v. Kaehler*, 23 Wis., 523, where upon demurrer to the counter claim of the defendant, the court inspected the complaint and determined the

It would be unfair to defend as well as to the court to allow plain- vary the ground of liability or will, and court must be able to determine accurately on demurrer what sort of action plain is trying to recover on.

nature of it, and said that "the subject of the action is the tort or wrong which was committed in the conversion of the money. That is the foundation and sole foundation of the plaintiff's claim in this form of action; for, unless the money was unlawfully converted, the action cannot be maintained." Counsel criticize this language and say that it is inconsistent with some of the cases first above cited. We answer clearly not, when correctly understood and applied, that is, in case proper objection was taken to a recovery upon any other ground, or upon any proofs short of those establishing the cause of action stated in the complaint. Counsel say, however, and we think with entire correctness, that after demurrer sustained to the counter claim, as was there done, on the ground that the complaint was in tort, there could be no recovery in the action except for a tort. The greatest injustice might result to the defendant if this were not so, or, if having been deprived of his counter claim on the ground that the action was in tort, the plaintiff should afterwards be permitted to recover against him as upon contract. And the same view is also in keeping with the decision of this court recently made in *Anderson v. Case*, 28 Wis., 505, where in an action *ex delicto* for the seizure and conversion of certain personal property, the plaintiffs claimed that the judgment appealed from should be affirmed by this court as one for money had and received, being the proceeds of the sale of the property by the defendants which the evidence on the trial showed had been made and the price received by them in money. But it was held against the plaintiffs, and the judgment was reversed because of the substantial difference between the action for the wrongful conversion and the action for money had and received, and because, in the former, execution goes against the body of the debtor as well as his property, while in the latter it goes only against his property. That decision is authority for the position that to justify the rendition of judgment upon proof of liability *ex contractu*, where the form of action is *ex delicto*, the proceedings must be changed by amendment so as to conform to the facts proved and the nature of the cause of action established, or otherwise that the judgment itself must distinctly specify and show that the recovery was upon contract and not in tort.

And directly also, in support of the same view, that the court must ascertain and decide definitely what the character of the

pleading is, and the nature of the cause of action stated in it, or intended to be, is the late case of *Lee v. Simpson*, 29 Wis. (June T., 1871), which likewise arose on demurrer to the complaint. And see *Ragan v. Simpson*, 27 Wis., 355, where it was held in an action for unlawful detainer, taken by appeal to the circuit court, that the defense set up and proved that one of the defendants was a mortgagor in possession, with right to redeem, could not be treated at the instance of the plaintiffs, as an action by the defendants, or one of them, to redeem from the mortgage, but that the defendants were entitled to a judgment of dismissal.

But the language in our own reports which most clearly indicates the true rule of law and practice in cases of this nature, is that of Mr. Justice Paine in *Samuels v. Blanchard*, supra, where, speaking of the complaint in that case, he says: "If the question had been presented properly at the preliminary stage of the case, the character of the summons, taken in connection with the form of the allegations of the complaint, might have required it to be decided that the action must in strictness be regarded as upon contract." And again, he says: "The facts that, if the action was considered as one upon contract, the objection appeared on the face of the complaint and might have been taken advantage of by demurrer, and that no demurrer was interposed, and that both parties introduced fully their evidence, as to the whole controversy, in the absence of anything showing that this distinct question was raised at all in the court below, we think sufficiently establish the claim of the respondent's counsel, that it was tried there as an action of tort, without objection, and must be so treated here."

The foregoing language indicates not only that the sufficiency of the pleadings must be determined on demurrer to it, but also the true nature and object of it, or what the particular kind or cause of action stated is, or is designed to be, and that for this purpose the character of the summons may be taken into consideration in connection with the form of the allegations of the complaint. And this we take to be the true rule, that the court must in the first instance decide with certainty what the specific cause of action counted and relied upon is, and, having decided that, it must next determine whether the complaint contains a sufficient statement of such cause, and if it does not, the demurrer must be sustained. In the present

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case the summons is for relief, and not one for a money demand arising on contract. The summons is appropriate, therefore, only to the action of tort or for damages for the wrongful conversion of the moneys. It corroborates the intention of the pleader as shown by the allegations of the complaint, to sue in that form of action, and from both, we think it clearly enough appears that the action is and was designed to be in tort, and not upon contract; and by this standard or by the rules of pleading which should govern in an action for the wrongful conversion of the moneys, must the sufficiency of the averments be tested.

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Considered as an action of trover, or one sounding in damages for the tortious conversion of the moneys, the complaint is in several respects faulty and imperfect. * * *

Judgment reversed.

for def.

CONWAY v. REED.

66 Mo., 346. [1877.]

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This was an action for damages sustained by respondent in consequence of the alleged unlawful and wrongful shooting of him by the appellant, whereby the amputation of his left leg was rendered necessary, and other injuries were suffered by him. In addition to the denial of the allegations of the petition, the answer set up, as a special defense, that appellant and respondent, and other boys about their own age, twelve or thirteen years, were out playing together, having a gun, and that in the course of their talk and play, whilst the gun was in the hands of appellant, without any fault or negligence, or design on the part of appellant, the gun, without being aimed at or directed towards the respondent, accidentally went off and was discharged, and by accident alone shot respondent, from which he suffered and had to have his leg amputated. On the trial evidence was offered by appellant tending to show that the shooting was purely accidental and unintentional, and, by respondent, that it was owing to the carelessness and negligence of appellant. The jury rendered a verdict in favor of the respondent for one thousand dollars. * * *

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HENRY, J.: An infant is liable for a tort in the same manner as an adult. *Bullock v. Babcock*, 3 Wend., 391; *Campbell*

v. Stakes, 2 Wend., 138; Vasse v. Smith, 6 Cranch, 230; Morgan v. Cox, 22 Mo., 374.

It is contended by appellant that, because the petition alleged that defendant unlawfully and wrongfully assaulted the plaintiff and shot him with a gun, evidence of a negligent or careless shooting would not sustain the averment in the petition; in other words, that the petition alleged one cause of action and the evidence established another, if any. Bullock v. Babcock, supra, was an action of trespass for assault and battery. The defendant was a boy about twelve years of age, and the evidence showed a negligent shooting of plaintiff by defendant with an arrow from a bow, and it was held sufficient to entitle plaintiff to a judgment.

In Morgan v. Cox, defendant was an infant. The petition in that case alleged a negligent killing of plaintiff's slave by the defendant, but there is no intimation in the opinion of the court that, if the petition had alleged, as in this case, that defendant unlawfully and wrongfully shot the slave, the evidence that it was the result of carelessness, would not have established the cause of action stated in the petition. Leonard, J., said: "The facts of the present case would, under the former system of procedure, have supported an action of trespass, and cannot, we think, be distinguished from the cases cited. In one of them the party, in uncocking his gun, accidentally discharged it and wounded a bystander. Here, the defendant accidentally struck the hammer of his gun against his saddle, and the same result ensued. In both cases it was upon the defendant to show that it happened, as the books say, by inevitable accident, and without the least fault, and the change that has been introduced by the new code in the remedy has not changed the rules of law as to the liability of the parties."

The change introduced by the new code in the remedy did not go to the extent of requiring less or more material allegations in a petition than were necessary to constitute a cause of action at common law, but only obviated the necessity of using those formal and technical aver-

ments which, it had been held, were necessary, and for which no other mode of stating the same thing could be substituted. The change introduced, to which the very able judge, who delivered that opinion, alluded, was that made by the first section of the act of December, 1865, Revised Statutes of 1855, page 1216, which provided that there should be but one form of

Def. contends that proof does not support the complaint

Code only obviated formal averments did not require more or less material allegations than necessary a good common law action

action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, to be denominated a civil action; and in the third section of article 6, page 1229, requiring in a petition "a plain and concise statement of the facts constituting the cause of action without any unnecessary repetition."

These sections have been retained in the subsequent revisions. Is it true that the proof of a negligent shooting does not sustain an averment of a wrongful and unlawful shooting? With regard to the liability of the defendant, the law holds an injury inflicted through carelessness as wrongful and unlawful; if accidental and inevitable no blame attaches to the person inflicting the injury. He is then, in no sense, culpable. If the act was lawful and right, which is the converse of the proposition, the party inflicting the injury through negligence could not be held liable, and is only responsible because it was unlawful and wrongful.

At common law the plaintiff was held to prove the cause of action alleged in his declaration, with as much strictness as under the code, and yet an action of trespass for assault and battery, as we have seen, was the proper form of action for direct injuries negligently and carelessly inflicted, as well as those which were intentional and malicious.

The celebrated case of Scott v. Shepperd, reported in 2 Wm. Black. 892, and cited and commented upon as often, perhaps, as any case in the books, was an action of trespass for assault and battery. Weaver v. Ward, Hobart, 134, cited by Judge Leonard, was in the same form of action. There the defendant, a soldier, had accidentally shot his comrade while exercising. In all these cases the plaintiffs maintained their actions, although the injuries received by them were proved to have been the result of accidents, and not intentionally committed. In none of them was it alleged in the declaration that the injury was occasioned by the negligence of the defendant. "In declarations in trespass, which lies only for wrongs immediate and committed with force, the injury is stated, without any inducement of the defendant's motive and intention, or of the circumstances under which the injury was committed." 1 Chitty's Pleadings, 387, 127. The court properly overruled the defendant's demurrer to the evidence. * * *

Judgment affirmed.

for plain.

CASEY v. MASON.

8 Okla., 665. [1899.]

BURWELL, J.: The defendant in error, Mack Mason, commenced this action in the district court of Logan County against the plaintiff in error herein, to recover damages for an alleged trespass upon real estate. The petition, omitting the caption, is in the following language: "Mack Mason, plaintiff, by Lawrence, Houston & Houston, his attorneys, complains of William Casey and Charles Casey, defendants, and for his cause of action against said defendants alleges that he is now and has been since the second day of August, 1897, the owner in fee and entitled to the possession of the southeast quarter of section thirty-one (31), in township fifteen (15) north, of range four (4) west of the Indian meridian, in the county of Logan and territory of Oklahoma; and that said defendants, on the sixth day of August, 1897, and on divers other days and times between that day and the commencement of this suit, with force and arms and against the consent of plaintiff, broke and entered upon said premises, with teams of horses and mules and plows, and then and there turned over and plowed with said teams and plows about thirty acres of said land, to the damage of plaintiff of \$100. Wherefore plaintiff demands judgment against said defendants in the sum of one hundred dollars damages and costs of this suit. Lawrence, Houston & Houston, attorneys for plaintiff." To this petition the plaintiffs in error filed a general demurrer, which was by the court overruled, to which ruling the defendants at the time duly excepted, and in this court they assign such ruling as error.

As the ruling of the court on the demurrer is the first question to be disposed of, we will consider it at this time before making a statement of the proceedings and trial subsequent thereto. It is contended by appellants that the petition fails to state a cause of action, because it nowhere shows that the plaintiff below was in the actual possession of the land at the time that it is claimed the trespass was committed; while, on the other hand, counsel for appellee contend that possession is not a prerequisite to maintaining the action, and that the allegations that appellee is and was the owner of the fee and entitled to the possession of the land (describing it) at the time of the alleged trespass is sufficient. What is a "trespass"? It is

Action to recover damages for the trespass to real estate in p. ing up sa

Def. demurrer & contends complaint deficient trespass cause it to alleg. posses. plain.

any misfeasance or act of one man whereby another is injuriously treated or damnified (See Bl. Comm., 208); any unlawful acts committed with violence, actual or implied, to the person, property or rights of another; any unauthorized entry upon the realty of another, to the damage thereof. (2 Bouv. Law. Dict., p. 747.) While different authors use different terms in defining the word, they all give to it the same meaning; but the definition given by Mr. Bouvier is probably as clear as any that can be found. The particular kind of trespass involved in this action, and to which alone we will direct our attention, is trespass upon real estate.

Originally, at common law, the only form of action for trespass upon real estate was trespass *quare clausum fregit*; and to maintain this action the plaintiff had to be in possession at the time the injury was sustained, and this action would only lie for injury to the possession. The owner of the fee could not maintain an action for trespass, even for permanent injury to the land, unless he was in the actual possession; and this condition continued until, by the statutes of Westminster, a new form of action was created, which enabled the owner of the fee to maintain an action of trespass where the damage affected the land, and the right of the owner of the legal title to the benefits of this action, which was called "trespass on the case," did not depend upon possession. These two forms of actions, therefore, existed at common law, and are the law of this country, except in so far as they are modified by statute. To sustain an action of trespass on the case, a plaintiff, not in possession, had to plead and prove such a state of facts as would show that the injury complained of was an injury to the land itself. But it is contended by the appellee that the common law forms of action have been abolished, and that now we have only one form of action, which is called a "civil action," and that we are not required to plead with that strictness that we were at common law. This contention is, in a measure, undoubtedly correct, but, while the forms of actions have been changed, we must not forget that the right of any particular action, as it existed at common law, remains the same, unless abridged or denied by the statute; and, while the common law forms of action have been abolished, the rights of such action continue to exist, but under a different name. Every cause of action that existed under the common law forms, which has not been

abolished, still exists under the name of a "civil action." The statute did not abolish common law causes of action—it only abolished their forms, and grouped them under one head—and there is no difference between trespass at common law and under the statute. A plaintiff, under the statute, must allege and prove every fact that he was required to allege and prove at common law. To illustrate: The owner of the fee, not in possession, cannot, under the statute, maintain an action for injury to the possession any more than he could at common law. At common law a plaintiff had to allege such a state of facts as would show that he was entitled to the relief prayed, or his action was dismissed. Will he, under the statute, be excused by pleading less? Certainly not. Under the statute he may amend, but the same facts must be pleaded as at common law, only under a different form, and the pleading is given a different name. At common law a cause of action had to be stated in a certain form, with technical precision. The statute ignores this form and looks to the substance of the pleading only. The statute, though, exacts from the pleader every allegation which is necessary to show that he is entitled to the relief sought.

With this thought in mind we will return to the petition in this case. It alleges that the plaintiff was the owner of the fee, and entitled to the possession; but these allegations are not sufficient to show that he was in the actual possession. In fact, the allegation that he "was entitled to the possession" of the real estate indicates that he was not in the actual possession thereof, and that is the construction which we place upon it; for it will be presumed that if the plaintiff is in the actual possession of the land he would have so stated in his pleading. But, under the contention of the appellee, that would make no difference. However, we take a different view of the law. Mr. Waterman in his work on Trespass (vol. 2, §987), says: "The action (referring to trespass) is brought to recover damages for an injury to plaintiff's possession of real estate. The substance of the declaration is that the defendant has forcibly and wrongfully invaded land in the possession of plaintiff. Though the title of property in the locus may, and often does, come in controversy, yet the gist of the action is always the injury done to the plaintiff's possession, actual or constructive." We think that one is not entitled to maintain an action for trespass unless he is in the actual possession of the realty, ex-

Trespass under statute is same as at common law

Allegation of actual possession was essential to recover for an injury to permanent interests in a matter & not a for defect.

cept where he holds the fee, and the injury is to the land itself, or where the plaintiff owns the fee, and further shows by his petition that the land is unoccupied, and he has the constructive possession thereof. This position is amply supported by the authorities.

(A part of the discussion dealing with the substantive law has been omitted.)

When a plaintiff brings an action he must state the facts in ordinary and concise language. After he has done this, it then becomes a question of law as to whether he is entitled to recover; and a plaintiff may maintain trespass for injury to his possession only when he is in the actual possession, and so alleges, or where he is the owner of the fee, and further shows by his petition that the land is unoccupied, and the plaintiff has the constructive possession thereof. He may also maintain an action in the nature of trespass on the case, where he alleges that he owns the legal title, and further sets out such a state of facts as will show that the injury is an injury to the real estate. These rules are fundamental, because if one has no possession of a certain tract of land, either actual or constructive, no right of his can be invaded by going thereon; and one having no legal title to real estate, either in whole or a reversionary interest therein, cannot be damaged by the destruction of buildings or trees, or any of the appurtenances thereon or thereunto belonging, because he has no interest in the land. Where there is no right there can be no remedy. These views are supported by the case of *Baseom v. Dempsey* (Mass.), 9 N. E., 744.

One other question remains to be settled before determining as to whether or not the demurrer was properly overruled, and that is, was the plowing of plaintiff's land an injury to the real estate? The petition nowhere alleges that the land plowed was meadow or grass land, or that appellants did any injury to any improvement. It only alleges that the appellants plowed plaintiff's land, to his damage, etc.; but, before we can say that the plaintiff suffered any damages by reason of the defendant's plowing his land, he must allege some state of facts that will show that the plowing damaged his real estate. Plowing land would be an injury to the possession, but not to the real estate, unless it were done under such conditions as would damage the soil, or destroy the grass or other grain or herbage, or improvements attached to the soil. But we think that the allegation

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that the defendants plowed plaintiff's land, without a further statement of facts showing how such plowing injured his land, is not sufficient to justify a recovery for damages to his real estate.

The appellee has cited a few cases other than those referred to heretofore in this opinion, in which it is held that it is not necessary for a plaintiff to allege possession in an action for trespass. But, strictly speaking, these cases are not for trespass at all. They are actions in the nature of ejectment, but by the statutes of several states are called actions in "trespass to try title." We have no such statute, but, even if we had, it would not change the rules stated herein. The pleader would have to state the facts, and from them the court would determine the character of the action, and, if the action were for an injury to the possession, the plaintiff would have to allege either that he was in the actual possession of the land, or set forth such a state of facts as would show that he had the constructive possession thereof; and to do this he would have to allege that the fee was in him, and that the land was, in fact, not occupied by any one else. We think that the petition failed to state a cause of action, and therefore the defendant's demurrer should have been sustained, and, this being true, it is not necessary to pass upon the other questions presented. For the reasons herein stated, the judgment of the trial court is reversed, at the cost of the appellee, and the case remanded to the lower court, with directions that the trial court sustain the demurrer, and to proceed further in accordance with the views herein expressed. All of the justices concurring, except BURFORD, C. J., who presided at the trial below, not sitting.*

for def.

✕ ROGERS v. DUHART.

. 97 Cal. 500. [1893.]

PATERSON, J.: The complaint alleges that the executors of the estate of Miguel Leonis let and demised unto the plaintiff certain lands belonging to the estate for the term of eight months from and after Feb. 1, 1891, and thereupon the plaintiff took possession and has ever since held the same; that on Feb. 1,

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*See also Bank v. Tiger Tail Mill, 152 Mo. 145.

1891, the defendant "entered upon the plaintiff's said described property, and drove into and kept upon the said land about 400 head of cattle, and about 3,000 head of sheep, and trod down and depastured and destroyed all the grass and herbage thereon, and so kept the said cattle and sheep upon the same continually thereafter and until on or about the 17th day of April, 1891, without the consent of the plaintiff, and to his damage in the sum of \$2,000." The facts of the case are not disputed. They show that defendant had the right to pasture 400 head of cattle upon the lands until the first day of September, 1890; that, after his right expired, the executors gave him "permission to pasture upon the said lands his gentle band of cattle, consisting of 50 or 60 head, until the 31st of December, 1890, in consideration of the said defendant watching over the place and keeping the cattle of all other parties off;" that at the time of giving said permission the executors notified the defendant "that he must remove his cattle on the 31st day of December, 1890, and that under no consideration was the defendant, Duhart, to keep or to allow any sheep to run upon the said ranch, and that was the only permission given the defendant, by either of the executors, to be or have his cattle upon the said ranch after Sept. 1, 1890;" that a few days after Sept. 1st, one of the executors told the defendant to remove his cattle from the ranch, and that he gave said executor "to understand that he had removed them, though he did not state so in so many words, (he stated that he had sold them, or was about to sell them;) that the defendant permitted 2,000 head of sheep, 300 head of cattle, and 25 head of horses belonging to him to graze upon the land in question from Jan. 1, 1891, until April 17, 1891; that neither the plaintiff nor the executors had knowledge of the fact that the plaintiff's (defendant's?) sheep, cattle, and horses were upon the lands subsequent to December 31st, 1890, but supposed that he had removed them from the premises, in accordance with his instructions, and that they did not know that he had abused the privilege granted to him on or about Sept. 1, 1890; that the lands described in the complaint were uninclosed pasture lands, and that neither plaintiff or any one on his behalf took possession of the land or any part thereof until about the 12th day of April, 1891; that plaintiff has sustained damages in the sum of \$900 by reason of the wrongful act of the defendant, as charged in the complaint.

The briefs are devoted chiefly to a discussion of the question whether an action trespass *quare clausum fregit* can be maintained by one who was not in the actual possession of the land at the time the acts complained of were performed. The respondent refers to cases showing that actual possession is not in all cases essential, and the appellant insists that the exceptions are confined to cases in which the plaintiffs were the owners,—where the title draws to it the possession for the purpose of redressing injuries to the estate. It would be a useless thing to attempt to reconcile the cases on this subject. Decisions adhering to the common law rules of pleading are seldom of any value in determining the sufficiency of a pleading under the code, and sometimes lead to serious departures from its letter and spirit. With us, mere forms of action are cast aside. Every action is now in effect a special action on the case. (Jones v. Cortes, 17 Cal. 487; Goulet v. Asseler, 22 N. Y. 225; Matthews v. McPherson, 65 N. C. 189; Brown v. Bridges, 31 Ia. 145;) and the rigid formalism and subtle distinctions found in the rules governing the common law forms of action are as inapplicable and inane under the modern plan of procedure as the highly dramatic speech, senseless repetitions, and symbolic gestures of the formulae prescribed for the five forms of the civil actions by the decemvirs of ancient Rome. Does the complaint state in ordinary and concise language facts sufficient to constitute a cause of action? That is the question, and not whether it is sufficient to show trespass *quare clausum*, trespass *vi et armis*, or any other technical form of action, *ex delicto* or *ex contractu*. The common law rule is that, if plaintiff declare in trespass *quare clausum* where the action should be case, he will be nonsuited at the trial; but under our system, if the facts alleged and proved are such as would have entitled the plaintiff to relief under any of the recognized forms of action at common law, they are sufficient as the basis of relief, whatever it may be. The bill of exceptions herein states facts which would entitle plaintiff to relief in an action on the case, which includes torts not committed with force, actual or implied, injuries committed to property of which plaintiff has the reversion only, and in fact all injuries not provided for in other forms of actions. The fact that the plaintiff alleges he was in possession is immaterial. The allegation may be treated as surplusage. "Superfluity does not vitiate." "The nature of the right of action

common-law decisions applicable cases arise under the (contrary to) Casey v. W. & previous 6 N. B. there had been treat on the merits of case; in various cases the question arose on murder;

of facts all or proved cause of action plain. cover. He has proved facts enough to recover the case. Allegation possession may be treated as surplusage

Court disregards the whole purpose of pleading, and makes the code worse, for def. than under the old common law rules since there is case on common

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has not been changed, nor has the amount of damages recoverable been effected; but the special and the technical rules which govern the use of the two common law actions mentioned (trespass and case) have certainly been abrogated." Pom. Rem. & Rem. Rights, § 232. The damages recoverable in the common law action of trespass *quare clausum* are for the wrong done to the plaintiff's possession as well as to the inheritance, and, where the entry is with actual force, treble damages are frequently allowed. While the plaintiff is not permitted to recover such damages under the facts proved in the case, he is certainly entitled to recover such damages as would have been recoverable if the action were the common law "action of case." To hold that the plaintiff could not recover would be to restore the old distinctions between these technical actions. Section 232, *supra*, note 2. There is nothing decided in any of the cases upon which the appellant relied opposed to the views which we have expressed. The statements upon this subject in *Holman v. Taylor*, 31 Cal. 340, and *Pollock v. Cummings*, 38 Cal. 685, are dicta. In *Uttendorfer v. Saegers*, 50 Cal. 497, it was alleged that the defendant forcibly entered upon the premises, and tore down the buildings, etc. It was claimed by the appellant that the action was trespass *quare clausum*. Respondent denied this, asserting that it was an action by the owner for damages done to the inheritance. The court held with the appellant, but did not hold that the action could not be maintained unless the plaintiff was in possession. The case simply holds that evidence of the possession of the tenant was material on the question of damages. The question of the sufficiency of the complaint or of the facts found to constitute a cause of action in case was not considered in any of the cases referred to. In *Heilbron v. Heilbron*, 72 Cal. 371, (14 Pac. 22), the court held that the defendants were entitled to show that at the time of the acts charged in the complaint they were in quiet and peaceable possession of the land, claiming the same under certificates of purchase and patents, and had continuously used and occupied it for 10 or 11 years prior to the commencement of the action. The decision followed the doctrine announced in *Page v. Fowler*, 37 Cal. 100, viz.: that a personal action cannot be made the means of litigating and determining the rights to the possession of real property, as between conflicting claimants. In *Bank v. Turman*, (Cal.) 30 Pac. Rep. 966, it appeared that the plaintiff did not

have title, and he neither had possession nor the right of possession. In the case at bar there is no pretense that the defendant was claiming adversely to any one. He vacated the premises promptly upon receiving a written notice on behalf of plaintiff demanding possession, and so states in his answer. He was never, at any time, after Sept. 1st, 1890, a tenant. Admitting that, when a tenancy is shown, the presumption from his continued possession is, that he holds in the same capacity, there is here shown an express agreement, by the terms of which he was simply to have the privilege of pasturing 50 or 60 head of cattle on the land, in consideration of his services in earing for the property, and seeing that other stock did not trespass on the land. The presumption is, therefore, overcome. *Bertie v. Beaumont*, 16 East, 33. Defendant contends that he was a tenant at sufferance after Dec. 31, 1891, but this is a mistake: he was a mere servant. *Haywood v. Miller*, 3 Hill, 90; *Robertson v. Georgia*, 7 N. H. 308. His possession was the possession of his employer. He could not have maintained an action against anyone for trespass, nor would he have been a necessary party plaintiff with the owner in a suit to recover damages for an injury to the property. *Ogden v. Gibbons*, 5 N. J. Law 599. Whether he be regarded as a servant or licensee, the result is the same. He was there for a particular purpose, and the moment he abused the privilege, or committed any act hostile to the interest of his employer or licensor, he became a trespasser. *Lyford v. Putnam*, 35 N. H. 563; *Loomis v. Burlingame*, 16 La. Ann. 199; *People v. Fields*, 1 Lans. 222; *Haskin v. Record*, 32 Vt. 575.

Judgment and order affirmed.

for plain.

JOSEPH DESSERT LUMBER CO. v. WADLEIGH.

103 Wis. 318. [1899.]

Action by the Joseph Dessert Lumber Co. against Matthew Wadleigh. There was a judgment of non-suit, and the plaintiff brings error. Affirmed. *action cutting her on land.*

The complaint in this action, omitting the formal allegations, is as follows: "That, during the winter of 1896 and 1897, the defendant unlawfully, and with force, broke and entered upon

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the plaintiff's land in the county of Marathon, and state of Wisconsin, known and described as follows, to-wit: Lots 6 and 16 of section 18 in township 26 north, of range 9 east, and there cut down and carried away trees and timber belonging to the plaintiff, of the value of \$170, and converted and disposed of the same to his own use, to the damage of the plaintiff \$170." The answer was a general denial. On the trial, plaintiff made proof that about 15,000 feet of timber had been cut on the lands described; that eight of these logs were found, with a lot of other logs, banked on Plover River, about three miles from this land; that the stumpage value was \$4 to \$5 per 1,000 feet, and the logs on the bank were worth about \$8 per 1,000 feet; and that the logs at the banking place had been cut by one Luchia, and had been sold by him to defendant on the bank. It was admitted that the defendant got the logs that were on the bank, drove them to his mill, sawed them into lumber, and sold the lumber. At the close of plaintiff's testimony, the defendant moved for a non-suit, on the ground that the cause of action stated was for injury to the lands, and no proof had been offered to connect the defendant with the cutting, or transportation of the logs from the land. This motion was granted, and a judgment for costs was entered in favor of the defendant. Plaintiff brings the case to this court by writ of error.

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BARDEEN, J. (after stating the facts). While it is true that the code has abolished the distinctions between actions at law and suits in equity, and has provided that there shall be but one form of action for the enforcement and protection of private rights and the redress and prevention of private wrongs, yet there still exist certain elements or features pertaining to actions which are unchanged thereby. These do not belong to the action as a judicial instrument for establishing a right, but inhere to and belong to the primary and remedial rights themselves. For the enforcement and protection of these rights but one form of action exists, but, as to the remedies which lie back of all forms of actions, the law still recognizes and observes distinctions which are as vital as before the code. It is just as necessary today as it ever was that a suitor should so state his cause of action that the court may determine whether it be *ex contractu* or *ex delicto*. In the one case the plaintiff would have to be satisfied with a mere money judgment, while in the other an order of arrest might issue, and an execution against

the body. This certainty of statement is also important for the purpose of determining the proper tribunal for the trial of the action. Under the law, certain actions are local to the extent that the trial thereof may be compelled in the county where the property affected is situated. It is therefore quite essential that the complaint should be sufficiently specific in allegation as to enable the parties and the court to say whether the action be local or transitory. It is these primary rights created by the law, and the wrongs committed against them, and the remedial rights resulting from such wrongs, which are to be considered in the practical administration of justice, and which remain unaffected by the reform legislation. When a complaint is presented for judicial inspection, it is the court's first duty to ascertain the nature of the cause of action alleged, as well to protect the rights of parties as to the place of trial as to administer the proper remedy. It is suggested that the complaint in this action has a double aspect, and may be either what was called in the old practice a complaint for trespass to lands or one of trover for the conversion of the timber. The language of Chief Justice Dixon in Supervisors v. Decker, 30 Wis. 624, seems especially applicable to the contention of the plaintiff's counsel in that regard. He says: "It would certainly be a most anomalous and hitherto unknown condition of the laws of pleading, were it established that a plaintiff in a civil action could file and serve a complaint, the particular nature and object of which no one could tell, but which might and should be held good as a statement of two or three or more different and inconsistent causes of action, as one in tort, one upon money demand on contract, and one in equity, all combined or fused and moulded into one count or declaration; so that the defendant must wait the accidents and events of trial, and until the plaintiff's proofs are all in, before being informed, with any certainty or definiteness, what he is called upon to meet. The proposition that a complaint, or any single count of it, may be so framed with a double, treble, or any number of aspects, looking to so many and incongruous causes of action, in order to hit the exigencies of the plaintiff's case or any possible demands of his proof at the trial, we must say, strikes us as something novel in the rules of pleading."

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Counsel for plaintiff in error contends that his complaint may be considered one in trover for the recovery of the value of cer-

tain timber cut from the plaintiff's land. He admits that it has "some aspects" of a complaint in trespass. After reading the complaint, we are convinced that that admission was advisedly made. It not only has some of the aspects of such a complaint, but the very likeness of such pleading. In its formal allegations, it is almost an exact reproduction of the complaints found in the form books for injuries to real estate by cutting timber. Abb. Forms, 470. It has all the attributes of a complaint for trespass *quare clausum*. It alleges the entry upon the plaintiff's land, the cutting of the timber, the carrying of the same away, and conversion to the use of the defendant. It was no doubt intended for just what it appears on its face to be,—a complaint for unlawful entry and cutting of plaintiff's timber. There was an absolute failure of proof in this regard. No proof was offered connecting the defendant with the cutting of any of the timber, or with any entry on the land. But it is said that a recovery in this case could have been sustained under that portion of the complaint which alleges a conversion of the logs by the defendant. The allegation that defendant converted the logs to his own use was but a statement of damages consequent to the illegal entry to the land. A very similar complaint was considered in *Merriman v. Machine Co.*, 86 Wis. 142, (56 N. W. 743). There was a motion to make the complaint more definite and certain, on the grounds that it alleged trespass, trover, and conversion, and injury to business credit. The court said: "There is but one cause of action, and that is trespass *quare clausum fregit*, and the other continuous acts of the defendants are stated as the consequential damages arising therefrom and connected therewith." The argument of the counsel that the complaint was framed to meet all the contingencies of the proof is evidently an afterthought. The counsel is too well versed in the law to make that suggestion, except as a last resort. The plan of "hitting it if it is a deer, and missing it if it is a calf," does not prevail in legal proceedings. "All that goes to the administration of justice should be definite and certain. This is almost equally essential to the claim, the defense, and the judgment. When these become vague and loose, the administration of justice becomes vague and loose, with a tendency to rest, not so much on known and fixed rules of law, as on capricious judgment of the peculiarities of each case, on a dangerous and eccentric sense of justice, largely personal to the judges, varying

necessary to allege special damages in complaint; but not general damages.

as cases vary, rather than on abiding principles of right, controlling equally the judgments of courts and the rights of suitors." *Pierce v. Cary*, 37 Wis. 232.

Again, it is said that the evidence of the conversion came in without objection for variance, and therefore plaintiff was entitled to judgment. The difficulty with this position is that such evidence was proper, under the complaint to show consequential damages. The defendant was not bound to anticipate that there was to be a failure of proof of the substantial matters alleged as a basis of the cause of action. When the plaintiff's case ended, he took the only course open by moving for a non-suit for failure of proof. The plaintiff stood upon its complaint as being one for conversion. It departed entirely from the original purpose and scope of the action, and sought to make the allegation of consequential damage stand as the substance of the cause of action alleged. That this was not permissible seems evident, when we come to consider that, in the one case, the action is local, and triable in the county where the land is situated; and, in the other, transitory and triable in the county of the defendant's domicile. A complaint cannot be made to serve the purpose of a dragnet.

It is further suggested that the action can be supported as one under section 4269, Rev. St., and that the defendant can be made liable as a purchaser of the logs from the original wrongdoer. That section refers to trespassers and purchasers "with notice" of such unlawful cutting. There was no proof that the defendant had any such notice. So far as the evidence discloses, the defendant was an innocent purchaser of the logs without notice, and, without allegation and proof connecting him with the original wrong done, the action cannot be sustained under that section. See *Tuttle v. Wilson*, 52 Wis. 643, (9 N. W. 822). The case of *Swift v. James*, 50 Wis. 541, (7 N. W. 656), comes the nearest to sustaining the plaintiff's contention of any in the books. It is an extreme case, and must be limited to the facts as therein disclosed. The complaint alleged an unlawful entry upon lands in Michigan, the cutting of timber, the carrying away, and a conversion of the same in the cities of Milwaukee and Chicago. The opinion says that, while the complaint might have been sustained as one for trespass *quare clausum*, if the action had been brought in Michigan, yet, the suit having been brought in this state, where an action for the orig-

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inal trespass could not be maintained, the allegations of the original trespass might be treated as surplusage, and the action sustained here for conversion. The court evidently ignored the principle, recognized in *Merriam v. Machine Co.*, *supra*, that the allegation of conversion was merely supplemental to the trespass alleged, and inserted to allow proof of the consequent damages. It is unnecessary to prolong this discussion. We feel quite clear that the cause of action alleged is for injury done to real estate and, there being no proof connecting the defendant therewith, the non-suit was proper. The judgment of the circuit court is affirmed.

for def.

GOULET v. ASSELER.

22 N. Y. 225. [1860.]

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Appeal from the superior court of the city of New York. Action for taking, selling and converting to the defendant's use a quantity of wines, liquors, cigars and bar furniture, the stock and utensils of a restaurant. The plaintiff made title under a chattel mortgage executed to him by M. Caussidiere and E. Bonnier; and defendants justified under a judgment and execution against the mortgagors, in which judgment they were the plaintiffs, the execution being levied on the property by their direction. The mortgage was dated March 19, 1855, and purported to be for the security of \$1,200, payable in one year from that date. It contained the following clause: "And until default be made in the payment of the said sum of money, we (the mortgagors), are to remain and continue in the quiet and peaceable possession of said goods and chattels, and in the full and free enjoyment of the same." The principal part of the property, in value, was wines, liquors and cigars. The defendants were prosecuting their actions when the mortgage was executed, and obtained judgment shortly afterwards. The officer sold the goods on the execution on the 27th April, 1855. The sale was in different parcels, and the goods were delivered by the officer to the respective purchasers, and the proceeds were paid to the defendants. No mention was made of the mortgage at the sale, though the defendants had been informed of it after the levy and before the sale took place. It did not appear that

the defendants purchased any of the goods at the sale. The action was commenced after the debt mentioned in the mortgage became payable; and the plaintiff had, after that time and before the bringing of this suit, demanded the goods of the defendants. The character of the complaint and of the evidence sufficiently appears from the following opinion.

The defendants, on the trial, insisted that the goods were subject to levy on execution against the mortgagors, and that the action could not be sustained. The jury were instructed to assess the value of the goods and to give their verdict for the plaintiff for that value, subject to the opinion of the court, with power to dismiss the complaint. The value was fixed by the jury at \$850, and the court at general term gave judgment for the plaintiff for that amount. The defendants appealed. The case was submitted without oral argument, on printed briefs.

SELDEN, J. If the plaintiff has any legal remedy for the injury of which he complains, it is clear that the remedy has not been properly pursued in the present case, and that the judgment therein cannot be sustained consistently with the well established principles of the common law, and the repeated decisions of this court. The difficulty in the case, and the error of the court below, will be most readily seen and appreciated by reference to some of the distinctions between those forms of action which the code has abolished. It can hardly be claimed that, prior to the code, an action of trespass or trover could have been maintained, either against the officer or the plaintiff in the execution, under the circumstances here disclosed. The case would have fallen directly within the principles of the case of *Gordon v. Harper* (7 Term. R. 9), and the subsequent cases of that class which have never been departed from, either in England or in this country. If any action would have lain before the code, it could only have been an action founded upon the special circumstances of the case, setting forth the injury to the contingent interest of the plaintiff in the property, and claiming damages for such injury.

While, however, in such an action, the plaintiff would have avoided the effect of the technical rule that, in order to recover in trespass or trover, he must show that he had either the actual possession or the right of the possession at the time of the alleged taking or conversion, he also, supposing that the action could have been maintained, would have imposed upon himself

the necessity of proving, specifically, the damages which he had sustained. In trespass and trover, before the code, the plaintiff recovered, if at all, upon the ground that he was the owner of the property in controversy. The measure of damages, therefore, in all such cases, was the value of the property taken or converted. Although it appeared that the plaintiff held the title as mere security for a debt, and that his debtor was abundantly able to pay, so that his actual loss was nothing, his recovery, in cases where he recovered at all, was nevertheless for the full value of the property, provided that did not exceed the amount of his lien. In a special action on the case, on the contrary, the plaintiff could, under no circumstances, recover more than the damages shown to have been actually sustained. He must prove to what extent his security was impaired, by showing whether the debtor was or was not responsible, and whether or not it was still in his power to follow and enforce his lien against the property.

Although the code has abolished all distinctions between the mere forms of action, and every action is now in form a special action on the case, yet actions vary in their nature, and there are intrinsic differences between them which no law can abolish. It is impossible to make an action for a direct aggression upon the plaintiff's rights by taking and disposing of his property, the same thing, in substance or in principle, as an action to recover for the consequential injury resulting from an improper interference with the property of another, in which he has a contingent or prospective interest. The mere formal differences between such actions are abolished. The substantial differences remain as before. The same proof, therefore, is required in each of these two kinds of actions as before the code, and the same rule of damages applies. Hence, in an action in which the plaintiff establishes a right to recover, upon the ground that the defendant has wrongfully converted property to the possession of which the plaintiff was entitled at the time of the conversion, the proper measure of damages still is, the value of the property; while in an action in which the plaintiff recovers, if at all, upon the ground that the defendant has so conducted himself in the exercise of a legal right in respect to another's property, as unnecessarily and improperly to reduce the value of a lien, which the plaintiff could only enforce at some subsequent

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day, the damages must, of course, depend upon the extent to which that lien has been impaired.

If we apply these principles to the present case, the error in the judgment under review becomes apparent. The complaint is, in substance, the same as a declaration in trover, under the former system of pleading. It is true that it sets out the mortgage as well as the judgment and execution obtained by the defendants, and the proceedings under them; but the gist of each of the counts is, that the defendants have taken the property of the plaintiff, and converted and disposed thereof to their own use. The form of the complaint in this respect would be of no importance, provided the proof had been such as to entitle the plaintiff to the judgment rendered. This court will not reverse a judgment simply because the case made by the evidence varies from that set forth in the complaint, where, as in this case, no objection was taken on that account at the trial. If it appears that the proof was sufficient to entitle the successful party to the judgment actually given, such judgment will be sustained. Here, however, the proof could, at most, only authorize the plaintiff to recover the consequential damages resulting to the contingent interest under the mortgage; while the damages were assessed and the judgment rendered upon the assumption that he was the owner of the property and entitled to the immediate possession. * * *

Judgment reversed and a new trial awarded.

for def.

WHITE v. LYONS.

42 Cal., 279. [1871.]

The complaint in this case, after setting forth facts entitling him to judgment at law against the defendant, prayed for an accounting that defendant might be adjudged to pay to plaintiff, in gold coin, what might appear on such accounting to be due, and for general relief. To this defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer being overruled, and an answer put in, there was a trial before the court, and a judgment rendered on November 18th, 1868, in favor of plaintiff, for the

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this case is correctly decided, as it states a right of action for money had or received, but the prayer for equitable

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sum of one thousand six hundred and thirteen dollars and seventy cents, and interest at the rate of ten per cent per annum on nine hundred and thirteen dollars and seventy cents thereof, from November 18th, 1863, and on seven hundred dollars thereof from July 1st, 1864,—in all two thousand three hundred and seventy-six dollars, in gold coin,—the judgment to draw interest at seven per cent per annum. Findings were filed sustaining the judgment. The defendant moved for a new trial, which was denied, and he then took this appeal from the judgment.

By the court, CROCKETT, J.:

The demurrer to the complaint was properly overruled. Under the code there is but one form of action in this state, and if the complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. If the facts stated are such as address themselves to the equity side of the court, the appropriate relief will be granted by the court, sitting as a court of equity. On the other hand, if the facts alleged are purely cognizable in a court of law, the proper relief will be administered in that form of proceeding. But a complaint which states a sufficient cause of action, either at law or in equity, is not demurrable as not stating facts sufficient to constitute a cause of action. In this case the defendant does not question the sufficiency of the facts alleged to constitute a cause of action in a proceeding at law, but insists that this complaint is a bill in equity, and that a court of equity has no jurisdiction of the case. In that event, the court will treat it as an action at law, and administer the proper relief in that form of proceeding.

*Judgment affirmed.**

for plain.

✕ RUSH v. BROWN.

101 Mo., 586. [1890.]

This is an appeal from the decision of the circuit court of Buchannon county, sustaining defendant's demurrer to plaintiff's amended petition for specific performance of an agreement to convey the real property of the respondent, Mary L.

* Compare Mulholland v. Rapp, 50 Mo. 42.

In White v. Lyons, the legal liability was the only one relied on, and the nature of it cannot be changed by an prayer for erroneous relief. But in Rush v. Brown plain. attempted to state a case for

Brown, a married woman, held as her legal (not statutory or separate) estate. Defendants are husband and wife.

The material facts on which relief is asked in the petition are these: That before the 25th day of February, A. D. 1887, the defendants, and each of them jointly and in the presence of each other, made, constituted and appointed, and by their declaration, by parol, lawfully authorized one Owen, as their agent, to sell for them the parcel of land in controversy, upon certain terms, for the price of twelve thousand dollars; that on the 25th of February, 1887, and while such agency was still in full force, said Owen, in the name of, and as such agent for, said defendants, sold said real estate to plaintiffs, upon the terms aforesaid, and plaintiff paid defendant's said agent the sum of three thousand dollars, and otherwise complied with the terms of sale; that at the time of the payment of said three thousand dollars, the said Owen, as the agent of said defendants, delivered to plaintiff a certain memorandum in writing, whereby the defendants acknowledged the receipt of said sum of three thousand dollars, and declared that the same constituted the cash payment of the purchase price of the said real estate that day sold plaintiff, etc., to which memorandum the names of the defendants were signed by said Owen, as aforesaid, their agent (which memorandum was filed); that, after such payment of three thousand dollars, the defendants, and each of them, after being informed of the payment thereof, and the making and the signing of said memorandum, each, and jointly by parol, ratified and affirmed the same, yet the defendants, and each of them, ever since have and now refuse to convey the same to plaintiff by deed in proper form.

Beef for spec. re one of a tract to real estate alleged to have been made Owen, as agent. He had paid \$3,000, chose

"Wherefore the plaintiff prays that defendants be ordered by this court to make, execute and deliver to plaintiff their deed in common form with usual covenants of warranty conveying to plaintiff the real estate aforesaid, as by their said note and memorandum herewith filed, they are bound to do, and that plaintiff further recover his costs in this cause laid out and expended, and for all and such other relief as should be granted in the premises."

BARCLAY, J.: Under our statutes and the uniform construction of them that has for many years prevailed, a married woman cannot be compelled to specifically perform a contract

In Mo as well as in Cal., a pleading is not spoiled by an erroneous prayer ~~part~~, tho it is evidence as to what kind of action plain thinks he is bringing. Here the

for the sale of her legal estate in land. R. S. 1889, sects. 2396 and 2397; Shroyer v. Nickell, 55 Mo., 264.

So well established is this rule, that we are disposed to stop with the briefest announcement of it rather than to hazard obscuring it by elaboration.

II. The prayer of the petition here is for specific performance and general relief. A general demurrer to the petition having been sustained and the case brought here in that shape, the question arises, can plaintiff obtain a reversal because the trial court did not enter judgment against one of the defendants (the husband) for the amount of the purchase money paid as alleged? (No prayer for such a recovery is contained in the petition.) That is evidently framed with a view to such relief as formerly could have been given only by a court of chancery as distinguished from a court of law.

But it seems to be imagined that any kind of judgment (whether legal or equitable in nature), that any particular facts alleged may warrant, should be given, under our code of procedure, in such a case, whether asked or not. We do not assent to that view.

One of the purposes of the code is to substitute specific and concise statements of the actual facts of each controversy for the more general declarations of demands formerly in use in courts of law, and the unnecessary prolix and elaborate pleadings in chancery. The object in view is to have the defendant fully advised in each case of the precise complaint he is called upon to meet.

In harmony with this object, it is provided that the petition shall contain (among other things) "a demand for the relief to which the plaintiff may suppose himself entitled," and that, "if the recovery of money be demanded, the amount thereof shall be stated, or such facts as will enable the defendant and the court to ascertain the amount demanded." R. S. 1889, sec. 2039.

It is obvious that, upon many states of facts presented to a court for action, divers remedies may be applicable, some strictly legal, others, perhaps, equitable in nature. It would be a departure from the true spirit and meaning of the code to require of plaintiff "a plain and concise statement of the facts constituting his cause of action" without requiring (at some stage of the case) a plain statement of the judicial action demanded

thereon, for the information of the defendant and of the court.

This is especially true where, as in Missouri, by the terms of the constitution (Const. 1875, art. 2, sec. 28), the right of trial by jury is preserved inviolable in ordinary cases "for the recovery of money only, or of specific real or personal property" (Revised Statutes, 1889, sec. 2131), usually termed actions at law, whereas suits formerly cognizable in chancery may be properly tried without a jury.

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With us it is, therefore, often of importance to all concerned to know what relief plaintiff demands, in order to determine the proper constitutional mode of trial. On this account, it is sometimes necessary, in the practical administration of justice, to recur to the inherent distinctions between legal and equitable rights and remedies, and to insist that parties asking aid of the court state the nature of the relief desired, as well as the facts on which they demand it.

It is the duty of all courts to so construe the code as "to secure parties from being misled." R. S. 1889, sec. 2117. But it is obvious that parties would often be misled as to the real nature and issues of the case if an ordinary judgment at law might be rendered by the court on a petition praying only equitable relief, without other notice of such legal demand than the supposed case in equity *incidentally* disclosed.

The code, no doubt, intended to abolish many distinctions with respect to forms of statement, between actions at law and suits in equity, and to empower the same court (if necessary in the same proceeding) to adjudicate legal and equitable rights and apply thereto legal and equitable remedies, but it does not sanction, and should not be so interpreted as to encourage such vagueness and uncertainty in the petition as would leave the adverse party and the court in doubt as to the relief demanded, and hence as to the mode of the trial, and as to the issues which would be material and decisive in it. *Humphreys v. Milling Co.* (1889). 98 Mo. 542.

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Moreover, we review in this court only such objections to proceedings as have been expressly decided by the trial court. R. S. 1889, sec. 2302.

Parties who wish to change or enlarge their demand for relief should do so by amendment or otherwise while the cause is before the trial court, at least in those instances where the case goes off upon demurrer, for the general provision permitting

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the court to grant "any relief consistent with the case made by the plaintiff and embraced within the issues." (R. S. 1889, sec. 2216) can have no proper application where final judgment for defendant has been reached on demurrer. In that event the prayer for general relief, supplemental to one for specific performance, cannot, in view of section 2039 (R. S. 1889), be construed as a prayer for a money judgment.

The judgment of the trial court was correct and is affirmed, with the concurrence of all the members of the court.*

for def.

EMERY v. PEASE.

20 N. Y., 62. [1859.]

Appeal from the Supreme Court. The complaint set out an agreement between the plaintiff and defendant, by which the former was acting as a superintendent of a manufactory of agricultural implements, and was to receive, in addition to a fixed salary, half the net profits of the business. It was provided that the net profits were to be ascertained by deducting from the gross receipts various enumerated charges and expenses, and all losses in the business, including bad debts. The plaintiff was to keep the books, and at the end of each year an accurate account was to be taken of the stock and business of the factory, the net profits ascertained and the plaintiff's compensation to be paid in cash or the defendant's notes at six months. The plaintiff averred that he served as superintendent one year, and at the end thereof, with the knowledge and assent of the defendant, he made out an accurate account and inventory of the stock and business, and stated an account of the net profits of the business according to the stipulations of the agreement, and delivered the said statement in writing to the defendant, February 19, 1855, to which he made no objections, and now (the complaint was verified March 30, 1855) has the same in his possession. Breach, that defendant refused to pay half the net profits stated in said account, which, after deducting a credit admitted by the complaint, amounted to \$6,544.62, for which sum, with interest, judgment was demanded.

* See also *Horn v. Luddington*, 32 Wis. 73.

The answer averred that the entire balance claimed by the plaintiff consisted in uncollected demands for goods sold during the progress of the business upon terms of credit, which in most instances had not expired, and insisted that the defendant was not liable to pay any sum for net profits until the demands outstanding were collected, and the losses to happen from bad debts deducted therefrom.

On the trial at the Albany Circuit before Mr. Justice Gould, the defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The judge granted the motion, holding that the plaintiff should have brought his action for an accounting. The plaintiff excepted, and the judgment against him having been affirmed at general term in the third district, appealed to this court.

COMSTOCK, J.: Regarding the suit as an action at law according to the distinction between legal and equitable remedies which formerly prevailed, we think the Supreme Court were right in holding that it could not be maintained upon the facts averred in the complaint. The pleader has set forth some matters of evidence having perhaps a slight tendency to prove that the account had been taken and the balance due to the plaintiff ascertained by the parties according to the principles of the agreement between them. But he seems carefully to have avoided the very conclusion of fact which alone would justify a suit for the recovery of an ascertained and admitted balance, to-wit, that the parties had stated the account and that the statement thus made showed there was due to the plaintiff the sum which he claimed to recover. The averment that the plaintiff had made a statement and delivered it to the defendant, who made no objections to it, does not necessarily establish the required conclusion even if it has a tendency in that direction; and consequently we cannot hold that the fact of an account stated between these parties has been pleaded in any manner or form. We are required, and we are always inclined to give a liberal and benign construction to pleadings, under the present system; but if a party either ignorantly or wilfully will omit the very fact on which his case depends, and will content himself with averring evidence inconclusive in its nature, he must take the consequences of his error if objection be made at the proper time.

But if an account of net profits has not been taken according to the rule furnished by the agreement, it seems to us, upon the facts stated, that the plaintiff is entitled to such an account and then to recover whatever sum, if anything, shall appear to be due to him. This is probably not the view in which the suit was brought, nor is it in accordance with the prayer of the complaint. But relief is to be given consistent with the facts stated, although it be not the relief specifically demanded (Code, § 275); and in determining whether an action will lie, the courts are to have no regard to the old distinction between legal and equitable remedies. Those distinctions are expressly abolished (Code, § 69). A suit does not, as formerly, fail because the plaintiff has made a mistake as to the form of the remedy. If the case which he states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled. In this case the plaintiff was to be paid one-half the net profits of a certain business, to be ascertained by an annual accounting in a particular manner. His averments are too feeble to show that any precise sum or any sum at all is due to him; but we think they do show that he is entitled to an accounting in order to ascertain whether anything and how much is due. That being ascertained by appropriate proceedings in the action, final judgment will be given accordingly.

The judgment must therefore be reversed and a new trial granted.

*Order for an accounting
in equity.*

GOULD v. CAYUGA NATIONAL BANK.

86 N. Y., 75. [1881.]

EARL, J.: This action was brought to recover damages for the alleged breach of an agreement made by the defendants to return to the plaintiffs certain United States bonds loaned by him to the bank, in June, 1865, the defendant being surety for the bank. The defendants, in their answer, interposed several defenses, among which were the statute of limitations and the return of the bonds to the plaintiff. They also set up that, before the commencement of the action, the plaintiff called upon the bank for the return of the bonds, claiming that they

had not been returned to him, and that the defendants denied plaintiff's claim, alleging and claiming that the bonds had been returned to him by the bank, and that thereupon the parties entered into a compromise agreement, whereby the bank agreed to pay the plaintiff, in satisfaction of his claim against it, the sum of \$25,000, and that it paid, and plaintiff accepted, that sum in satisfaction of his claim against it for the bonds loaned.

Upon the trial the plaintiff proved the loan of the bonds and that they had not been returned to him, and then rested his case. The defendants then proved the compromise agreement, and the payment of the \$25,000, and rested their case. The plaintiff then gave evidence tending to show that he was induced to enter into the compromise agreement by the fraud of the defendants. The plaintiff did not, prior to the commencement of the action, return or offer to return to the bank the \$25,000 paid by it. After the defendants had at the trial taken the objection that the plaintiff had not returned or offered to return the money, and at the close of the evidence, the plaintiff paid into court the sum of \$25,000, with the interest thereon from the time of the payment, and at the same time, as explanatory of the payment, filed a paper, of which the following is a copy, to-wit: "That plaintiff now deposits in the court with the clerk thereof the sum of \$35,159.72, a sum equal to a certain sum of \$25,000, which was paid to the plaintiff by the defendant, The Cayuga County National Bank, or by Josiah N. Starin, the 12th day of March, 1873, as set forth in a certain receipt or instrument of writing of that date mentioned in the pleadings and proofs in this action, and the interest upon such sum until the 1st day of January, 1879. The said deposit being made under the following conditions:"

First. "That said deposit shall remain in the custody of the court and not paid to either party until the final judgment shall be rendered in such action. The court, by rendering such judgment or by its action under the judgment, shall restore such deposit to the plaintiff unless it shall be determined in and by such final judgment that the defendant, the Cayuga County National Bank, ought to recover such, the said sum of \$25,000, so paid to the plaintiff as aforesaid, in which case the sum of money herein mentioned shall be awarded to the defendant, the Cayuga County National Bank."

"Rollins Tracey, Plaintiff's Attorney."

This deposit was made more than five years after the payment of the money to the plaintiff, more than two years after the plaintiff had discovered the fraud, and long after the commencement of this action. The trial court found that the loan was made, that the bonds had not been returned or replaced, that the compromise agreement was made, and that the plaintiff was induced to enter into it by the fraud of the defendants; but it decided that the plaintiff could not recover because he did not before the commencement of the action return or offer to return the \$25,000 paid to him under the compromise agreement, and therefore it dismissed his complaint. The same view was taken of the case at the general term, and as we are of opinion that that view was correct, we will confine our attention now to its consideration.

The compromise agreement, unless annulled, is an absolute bar to this action. It is a general rule laid down in the text books and the reported cases that a party who seeks to rescind a contract into which he has been induced to enter by fraud must restore to the other party whatever he has obtained by virtue of the contract. (Cobb v. Hatfield, 46 N. Y., 533.) He cannot retain anything he received under the contract and yet proceed in disaffirmance thereof. The rule is laid down in Evans v. Gale (17 N. H., 573), as follows: "If one has been induced to make a contract to pay money or to deliver anything, by such means that he is entitled to rescind the transaction, he must, in order to do so, first restore to the other whatever may have been received in exchange for the money or other thing he seeks to recover back, and to which he would become entitled as his own property immediately upon the rescission of the act, whose proper effect would have been to vest it in the other party." The reason of the rule, as stated by Chief Justice Shaw in Thayer v. Turner (8 Mete., 550) is that "the plaintiff, as far as it is in his power, shall put the defendant in statu quo, by restoring and revesting his former property in him, without putting him to an action to recover it, before he can exercise his own right to take back the property sold, or bring an action for it." And as stated by Chief Justice Parsons in Kimball v. Cunningham (4 Mass., 502), "the vendee shall not compel even the fraudulent seller to an action to recover back the property he has parted with in the exchange." The effect of the avoidance of an agreement on the ground of fraud is to place the

parties in the same position as if it had never been made; and all rights which are transferred, released or created by the agreement are revested, restored or discharged by the avoidance.

Here the \$25,000 was not paid upon any debt acknowledged to be due the plaintiff from the bank. The bank denied the claim, but paid the money to settle the dispute, and hence the plaintiff obtained it solely by virtue of the compromise agreement.

But the claim of the plaintiff is that because it was finally determined by the court that the sum paid the plaintiff and much more was due to him from the bank, the fact that he did not return the money furnished no defense to the action. It is believed, notwithstanding the earnest and able argument of the learned counsel for the appellant, that this claim, under the circumstances of this case, has no sound basis of principle or authority to rest upon. * * * (The court here reviewed a number of cases.)

But the defrauded party need not rescind and sue in an action at law for the consideration parted with upon the fraudulent contract. He may bring an action in equity to rescind the contract, and in that action may have full relief. Such an action does not proceed as upon a rescission, but proceeds for a rescission. In such a case it is sufficient for the plaintiff to offer in his complaint to restore to the defendant what he has received, and the rights of the parties can be fully regulated and protected in the judgment to be entered. Such was the case of Allerton v. Allerton (50 N. Y., 670).

If this had been an action in equity to rescind the contract, the court could have done equity between the parties and so moulded its judgment as to accomplish that result. It could, if needful, have brought into the litigation matters pertaining to the trust created by Starin for the plaintiff's benefit, and to that end could have ordered that Starin and the trustee be made parties. This action was brought as an action at law, no mention being made in the complaint of the compromise agreement or of the \$25,000 paid to the plaintiff. A purely legal defense was set up; it was tried as an action at law, and no motion was made to convert it into an equity action.

It is idle to say that the distinction between legal and equitable actions has been wiped out by the modern practice. It is

Contrary
evidence
shown

true that all actions must be commenced in the same way; that in every form of action the facts constituting the cause of action or defense must be truly stated; that fictions in pleadings have been abolished, and that both kinds of actions are triable in the same courts. But the distinction between legal and equitable actions is as fundamental as that between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out. (Reubens v. Joel, 13 N. Y., 488; Goulet v. Asseler, 22 id., 225.) At any rate, the difference between an action to rescind a contract and one brought, not to rescind it, but based upon the theory that it has already been rescinded, is as broad as a gulf. They depend upon different principles and require different judgments.

Here the tender of the money into court at the close of the trial would have been sufficient if this had been an equitable action for a rescission and relief consequent thereon. But the tender having been made after the action was commenced was insufficient for this action. Even if this tender had been made before this action was commenced, it would have been insufficient, as it was not a tender to the bank. The money was not offered nor restored to the bank, nor placed in its power. It was placed in the custody of the court and the bank could not take it. To entitle a party to proceed as upon a rescission of a contract that is fraudulent, the tender or restoration must be to the other party, and must be without qualifications or conditions. Every right under the repudiated contract must be absolutely surrendered.

The conclusion we thus reach leaves the defrauded party with ample remedies. One situated like the plaintiff can rescind by tendering or restoring what he has received, and then commence his action. He may keep what he has received and sue to recover damages for the fraud; or he may commence an action in equity to rescind and for equitable relief, offering in his complaint to restore, in case he is not entitled to retain, what he has received. These actions are all fundamentally different. If the party is not willing or able first to restore what he has received, he is confined to one of the last two remedies. * * *

Judgment affirmed.

for def.

LACKLAND v. GARESCHE.

56 Mo., 267. [1874.]

ADAMS, Judge, delivered the opinion of the court.

This was an action by attachment, brought by the plaintiff against Thomas F. Smith, as a non-resident of this state, in which the defendant, Garesche was summoned as garnishee. No other property or effects of the defendant, Smith, were attached, except such as were alleged to be held by the garnishee, Garesche, as trustee for the use of Smith. The property held in trust by Garesche consisted of several houses and lots in the city of St. Louis. The only interests to which Smith was entitled was the right, under certain terms and conditions, to receive the net income, during his life, arising from the rents and profits after the payment of all expenses, such as taxes, insurance, repairs, etc. The nature and terms of the trust are manifested by a deed of conveyance, under which Garesche holds the title. According to a power in the original conveyance, Garesche had been substituted as the trustee in place of a prior trustee. For a full statement of the trusts of this conveyance, reference is made to the case of *McIlvaine v. Smith et al.* (42 Mo., 45); where it was held by this court, that Smith had no interest in the realty, subject to sale under execution.

One of the issues raised by the pleadings was that the conveyance under which Garesche held the trust property, was fraudulent and void as to the creditors of Smith; but this issue was entirely ignored at the trial. It was not referred to, nor was any attempt made at all, to attack the deed as being fraudulent as to creditors, and, therefore, we shall treat this case as though no such issue was in it. Under this view, it was simply an attempt to draw an exclusive equity jurisdiction into a court of law, by means of the statutory process of garnishment in attachment suits. The court undertook to call a trustee of a pure express trust to account, and to enforce the performance of his duties as trustee in a trial of an issue at law, by a jury, or by the court sitting as a jury, and proceeded to examine into the state of his accounts, so far as to ascertain, as the record shows, that the trustee was accountable at least for a sum larger than the plaintiff's demand, which had been reduced to a special judgment, in the attachment suit, and then ordered

the amount of that judgment to be paid to the plaintiff by the garnishee. And as the garnishee failed to comply with this order, the court declared him a debtor of the plaintiff and rendered a judgment against him, as upon a legal indebtedness due from him to defendant, Smith, and without any attempt to have a full and complete account taken and stated of the trust matters.

Although our code of practice has abolished all distinctions in the forms of actions for the enforcement or protection of private rights, and the redress or prevention of private wrongs, the line of demarkation between legal and equitable cases is still preserved and fully maintained by the code. The pleadings develop the nature of the case, whether legal or equitable, and as thus presented, the court proceeds to hear and determine it, either as a court of law or of equity, according to the pleadings. The remedy by attachment for the collection of debts in this state is essentially legal, and not equitable, in its nature and procedure. It is founded alone upon statutory law and, with few modifications, has been in existence as long as the state itself. It was in full force when the present code of practice was adopted, and it is safe to say that it has not been changed or essentially modified by that code. The whole tenor and scope of our attachment laws, so far as garnishees are concerned, indicate that they are intended to operate on legal property rights and effects of the debtor in the hands of the garnishee. The service of the garnishment operates as an attachment of such property in his hands. (I. Wagn. Stat., 184-5, §§ 18, 19, 23, and 664, §§ 1, 4, 7, 8.)

The issues on the answer of the garnishee are to be tried as ordinary issues between plaintiff and defendant. (I. Wagn. Stat., 666, 667, § 17.) If it appears upon the trial that the garnishee is possessed of property, effects or money of the defendant, the court or jury must find what property, etc., and the value thereof, and he may discharge himself by paying or delivering over the same to the proper officer under the order of the court, etc. (I. Wagn. Stat., 667, § 18.) These provisions demonstrate that the rights, credits, and effects in the hands of the garnishee, are such as are not encumbered with trusts, and such as may be delivered over or paid to the officer under the direction of the court, free from the embarrassment of the trust. It must be borne in mind that this was a con-

tinuing express trust, to last at least for the lifetime of the beneficiary, which has been drawn into a court of law, by way of garnishment, to compel the trustee to execute the trust in favor of a creditor of the beneficiary. In my judgment, it was not contemplated by the legislature to authorize a court of law, in a mere side issue growing out of an attachment suit, to exercise the intricate and complicated duties of a chancellor in the enforcement of purely equitable trusts. It is competent, under our statutes, to summon a fraudulent assignee of property and effects, and compel him to disgorge in favor of a creditor. For when such issue is found in favor of the creditor, no trust exists, and the property or effects can be delivered over without any trouble, to satisfy the debt. So if there has been a settlement between a trustee of an express trust and his beneficiary, and a balance found to be due upon such settlement, it becomes a debt at law, and may be garnisheed. But nothing of this kind appears in this case. We do not say that the plaintiff is without remedy. (*Pendleton v. Perkins*, 49 Mo., 565.) What we decide is, that if this trust was not fraudulent as to the creditors of Smith, the plaintiff has mistaken his remedy.

The judgment at general term is affirmed. The other judges concur.

for def.

Plam. seek wrong reme

DENNER v. C., M. & ST. P. R. R. CO.

57 Wis., 218. [1883.]

This is an action to perpetually enjoin the defendant from diverting a stream of water so as to overflow lands in the possession of the plaintiff, and also to compel the defendant to construct, at its own expense, and forever maintain a suitable passageway for the passage of said stream in its own natural channel, and for damages and costs, and for general relief. The defendant demurred to the complaint on the ground that it appears upon the face thereof that it does not state facts sufficient to constitute a cause of action. From the order sustaining that demurrer this appeal is brought.

CASSODAY, J.: Does the complaint state facts sufficient to constitute a cause of action within the meaning of subdivision 6, § 2469, Rev. St. (subdivision 6, § 5, c. 125, Rev. St. 1858).

This provision was taken from the New York code, § 144. It has, however, been construed by this court as well as the New York courts. In so far as such constructions may differ, we feel compelled to follow our own, especially where such construction was first given by this court.

The question here presented was directly involved in *Sup'ors of Kewaunee County v. Decker*, 30 Wis., 624. In that case it was apparent from the whole complaint and the relief demanded that the cause of action sought to be stated was one in tort and not on contract, and it was there held, on demurrer, in effect, that the plaintiff must be confined to the cause of action thus sought to be alleged, notwithstanding it was insufficiently stated, and that there were other statements in the complaint incidentally made, sufficient, if taken by themselves, to constitute a cause of action on contract. In that case the previous New York authorities were reviewed and distinguished. Judge Dixon, giving the opinion of the court, there said: "And this we take to be the true rule, that the court must, in the first instance, decide with certainty what the specific cause of action counted and relied upon is, and, having decided that, it must next determine whether the complaint contains a sufficient statement of such cause of action, and if it does not, the demurrer must be sustained." Applying that test it was there held that the cause of action there sought to be stated was an action of trover, or one sounding in damages for the tortious conversion of moneys, and not an action on contract, and so confining the allegations of the complaint to such an action it was held to be insufficient. That decision was placed upon the reasoning of previous decisions of this court, and was afterwards sanctioned in *Pierce v. Carey*, 37 Wis., 234, and the more recent case of *Gormeley v. The Gymnastic*, 55 Wis., 252; (s. c. 13 N. W., 242). We have nothing to add to the reasons given in those cases.

We do not regard these decisions in conflict with *Tewksbury v. Schulenberg*, 41 Wis., 584, cited by the learned counsel for the plaintiff. That was an action to recover tolls for aiding in driving logs and passing them over the plaintiff's dams, and the complaint asked to have the same adjudged a lien upon the logs. That was an action before the revised statutes, and hence was at law and not in equity. The court merely held that the demurrer would not be sustained, even though the facts stated did not entitle the plaintiff to such lien. The case,

therefore, is clearly distinguishable. Applying to this case, the test thus adopted, and it is very evident that the cause of action here sought to be alleged is one in equity and not at law, notwithstanding the complaint may contain allegations which if eliminated and standing by themselves might be sufficient to constitute a cause of action at law. The question really presented is, therefore, whether the complaint states facts sufficient to constitute the cause of action in equity sought to be alleged?

Question: Does
complaint state
a good cause
equity?

In Remington v. Foster, 42 Wis., 608, this court held that the statute which authorized judgment of abatement in actions at law for damages by private nuisance, had the effect to abrogate the remedy in equity to abate private nuisances. To the same effect are Cohn v. Wausau Boom Co., 47 Wis., 314 (s. c. 2 N. W. 546); Pennoyer v. Allen, 51 Wis., 360 (s. c. 8 N. W. 268); Lohmiller v. Indian Ford W. P. Co., id. 688 (s. c. 8 N. W. 601).

The statute referred to is chapter 137, Rev. St. (ch. 144, Rev. St., 1858). Evidently, to obviate that difficulty, the statute was amended by chapter 190, Laws 1882. That amendment restores equitable jurisdiction in the particular cases therein named. To bring the case within such jurisdiction the essential facts should be affirmatively alleged in the complaint. Here it is enough to say that the complaint fails to state facts sufficient to bring the case within any of the provisions for equitable relief in that amendment. In fact, it is not so claimed by the appellant's counsel. Without going into particulars, it is enough to say that it does not appear from the complaint that he has any title or vested interest in the land. It simply alleges possession under a contract for the sale thereof to the plaintiff. It is entirely silent as to the other party to the contract, or whether such party ever had any title to the land. With such omissions from the complaint we cannot presume that the plaintiff had either a legal or equitable title to the land from the mere fact of possession. Without such title we are unable to perceive how the nuisance complained of can work to the plaintiff an irreparable injury, interminable litigation, or a multiplicity of actions, or a continuous or constantly recurring injury to the plaintiff within the meaning of the amendment. With nothing more than a mere naked possession we are unable to say that the plaintiff has not an adequate remedy at law for the injury complained of.

Such being our views, the order of the Circuit Court must be affirmed.

CADDELL v. ALLEN.

99 N. C., 542. [1888.]

The plaintiff, Caddell, brought an action in ejectment against the defendant, Allen. Judgment for plaintiff. Defendant appeals.

MERRIMON, J.: In the course of the trial of this action, the plaintiff, the defendant objecting, was allowed to put in evidence a paper writing purporting to be a power of attorney from Stephen Lacey and Thomas Lacey to David Cuthbertson, empowering the latter to sell and convey the title to the lands therein mentioned and described. This paper writing concluded as follows: "In witness whereof, we, the said Stephen and Thomas Lacey, have hereunto set our hands and seals, October 26th day, 1816." (Signed) Stephen Lacey, Thomas Lacey. But no seal, nor any mark or scroll purporting to be a seal, is affixed to or set opposite these signatures, or elsewhere in the writing. The plaintiff, likewise the defendant objecting, was allowed to put in evidence a deed from David Cuthbertson, attorney, which purported to convey the title to the lands therein mentioned and described, of Stephen Lacey, one of the parties signing and making the power of attorney, to Aaron Stegall. The following is a copy of so much of this deed as need be set forth here: "This indenture, made this 23d of Feb., 1828, between D. Cuthbertson, of the State of North Carolina, and County of Anson, attorney for Stephen Lacey, of the one part, and Aaron Stegall of the state and county aforesaid, of the other part, witnesseth, that, for and in consideration of one hundred and fifty dollars to him in hand paid by the said Stegall, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, four certain tracts of land lying," etc. (describing them), "and the said D. Cuthbertson, in the name and by virtue of his power of attorney from the said Stephen Lacey, warrant and forever defend the said tracts, containing six hundred acres of land, and premises, free and clear of all manner of incumbrances, to the said Stegall, his heirs and assigns, forever, in as full and ample a manner as the most learned in the law can devise. In witness whereof, the said D. Cuthbertson, attorney as aforesaid, doth hereunto assign this instrument, and seal the same. (Signed) D. Cuthbertson,

Attorney for Stephen Lacey. (Seal.)” The defendant, among other things, requested the court to charge as follows: (1) “That the power of attorney from Stephen and Thomas Lacey to D. Cuthbertson is void for uncertainty in the description of the land which the said D. Cuthbertson is authorized to sell and convey; that the said power does not authorize the said Cuthbertson to convey the land said to be embraced in the Lacey grant. (2) That the deed from D. Cuthbertson, the alleged attorney and agent of the said Stephen and Thomas Lacey, passes no title to the land therein attempted to be conveyed; the conveyance being in the name of Cuthbertson, and not in that of the said Lacey. (3) That if said deed by Cuthbertson, attorney, passes any title at all, at most it is only a life estate, which has ceased; the said Cuthbertson, Stephen and Thomas Lacey, and Stegall being all dead when this suit was brought.” There was a verdict and judgment for the plaintiff, and the defendant appealed to this court.

It is the settled law of this state, that an agent or attorney in fact cannot execute a deed of conveyance of land, binding upon his principal, unless he be authorized thereunto by a power of attorney under seal. The ancient rule of law in this respect has not been modified or trenched upon by this court, and we are not at liberty or inclined to so do now. If the hurry and convenience of business transactions in the present state of society require easier and less solemn methods of conveyance of land than formerly, it is the province of the legislature, and not that of courts, to modify and change settled rules of law to that end. * * *

But, if the power of attorney were insufficient, the deed in question was not executed in pursuance and in the proper exercise of the power. It everywhere, in the body of it, purported in terms to be that of “D. Cuthbertson, * * * attorney of Stephen Lacey,” etc. He, not his principal, purported to convey title; and, as a consequence, no title passed, for he had none to convey. The deed should, by its effective terms of conveyance, be and purport to be that of principal, executed by his attorney, and to convey the estate of the principal. It is not sufficient that the attorney intended to convey his principal’s estate; he must have done so by apt words, however informally expressed to effectuate that purpose. The distinct purpose of the principal to convey, and the necessary form and operative

words to convey his estate, must appear in the body of the deed in all essential connections. His name should be signed, and purport to be signed, and his seal affixed by the attorney; but the signing will be sufficient, if it be by the attorney for the principal. In *Oliver v. Dix*, 1 Dev. & B. Eq., 159, the deed in question, very much like the one before us, ran throughout in the name of "Thomas Dix, attorney in fact for James Dix," and was signed and sealed in the same way. Chief Justice Ruffin, delivering the opinion of the court, said: "It is clear that the deed offered to the plaintiff is altogether insufficient. No doubt, the defendant intended to comply with the contract, and both he and the plaintiff thought he was doing so. But the deed does not purport to be the deed of James Dix, the owner, but of Thomas, as the attorney. Allusion is not had to the method of signing only. It may not be material whether it be signed J. D. by T. D., or T. D. for J. D. But the instrument must profess in its terms to be the act of the principal." To the same effect are *Scott v. McAlpin*, Term R. (N. C.), 587 (155); *Locke v. Alexander*, 1 Hawks., 412; *Redmond v. Coffin*, 2 Dev. Eq., 437; *Duvall v. Craig*, 2 Wheat., 45, and a note on p. 56; *Appleton v. Binks*, 5 East, 148. So that the power of attorney and the deed were both insufficient; and the court should have rejected them when objected to in the course of the trial, and, failing in this, it should have given the special instructions asked for in such respect to the jury.

It was suggested that the court could see, upon the face of them, the purpose of the power of attorney and the deed to convey the title to the principal, and they should receive such interpretation as will effectuate the purpose. Courts will interpret pertinent words and phraseology in deeds and like instruments in such way as to effectuate the intention of the makers thereof, appearing from the whole instrument, when this can reasonably be done; but there must be proper, pertinent and necessary words and phraseology in them to interpret. The court cannot supply and interpolate these. That would be to make them; and this is not the province of the court, but only that of the parties to them. The court can only construe what appears, however informally. It cannot supply the substance, or change or modify that appearing, although it may be satisfied that the parties to the instrument failed to make it what they

intended. They are bound by what they have, in effect, under the rules of law, done, whatever may have been the intention.

It was further suggested, inasmuch as the court can, in the same action, try, and hear, and determine both legal and equitable causes of action in appropriate cases, it, seeing the intention of the parties, as to the power of attorney and the deed before us, could and ought to require them to be reformed, and the plain mistake corrected. It may be that, in appropriate cases, this could and ought to be done. But here the action and the cause of action are simply at law. No equitable cause of action is alleged, nor is such relief demanded. When equitable rights are to be litigated and relief sought, there must be proper allegations and pleadings to such end, and all parties to be effected by the relief demanded must be made parties to the action. It may be that those interested adversely to the plaintiff will not consent to the making of the desired correction, and they are entitled to have their day in court, and to contest the claim of the plaintiff in the ordinary course of procedure. It is a mistaken notion, that to some extent prevails, that under the present method of civil procedure the courts can try, hear, and determine civil actions, and causes of action anyhow and in any way, however summary. It has character and integrity. It has purpose, principles, and forms, that are necessary in the safe and orderly administration of public justice, that must be observed, and the courts must uphold and enforce.

There is error. The defendants are entitled to a new trial, and we so adjudge. To that end, let this opinion be certified to the superior court. It is so ordered.*

for def.

MAGWIRE v. TYLER.

47 Mo., 115. [1870.]

This is a motion to affirm the judgment of the common pleas rendered at the March term, 1865. From that judgment an appeal was taken to this court, and at the March term, 1867 (40 Mo., 406), said judgment was reversed and Magwire's petition

* Accord, *Hollister v. Bell*, 107 Wis. 198; *Hopkins v. Washington Co.*, 56 Neb. 596.

dismissed. The judgment of this court was reversed in the supreme court of the United States, at the December term, 1868, and was again argued there on a motion to reform the judgment, December term, 1869. The supreme court of the United States rendered two opinions, which will be found in 8 Wall., 650.

For statements of case see opinion of the court. As to the facts at large touching the case, see 40 Mo., 407.

WAGNER, J., delivered the opinion of the court.

The former judgment of this court having been reversed in the supreme court of the United States, the plaintiff now files the mandate of that court and moves that the judgment of this court be reversed, and that of the common pleas court of St. Louis county be affirmed.

When the case was here before (40 Mo., 406) it was determined that the defendants possessed the legal title and had also the equities, and accordingly judgment was given in their favor.

On error to the supreme court of the United States, that court adjudged that the legal title to the premises in dispute was vested in the plaintiff; that Brazeau's confirmation, under which plaintiff holds, was valid; and that Lebeaume's confirmation, whence the defendants claim to derive title, embraced no part of the land in controversy. (Magwire v. Tyler, 8 Wall., 650.)

If the decision in the supreme court of the United States be correct, the case has been tried throughout on a mistaken theory. The suit was instituted by a bill in equity, and proceeds upon the ground that the proper legal title was in the defendants. The petition alleged that the plaintiff had the better equity, and that the land justly belonged to him; that the defendants, and others, in combination and confederacy with them, procured a patent to be issued to them, and that the survey and patent were procured and issued by fraud, covin, and misrepresentations; that the defendants, previous to the acquisition of any claim or interest in the land, had notice of the interest or claim of the plaintiff; and that the defendants' patent was a cloud on the plaintiff's better title. The petition then prayed that the court, by its judgment and decree, would divest out of the defendants all the rights, title, and interest acquired or claimed by them and each of them, from Louis Labeaume or any one claiming under him, and invest the same in the plaintiff and put him in possession thereof, and for an account, etc.

The answer denied these allegations, and claimed that defendant had the prior title and the better equity. It also pleaded in bar a final decree in chancery in a former suit between the same parties, upon the same identical equities; alleged that defendants were innocent purchasers for a valuable consideration, and insisted that plaintiff's suit was barred by the great lapse of time.

The only question which it was competent for the supreme court of the United States to notice when the cause was removed there was the question of title arising out of the respective confirmations under which the parties claimed.

Everything else set up in the bill and answer was peculiarly and exclusively of local state jurisdiction, over which the national tribunal had no control, and concerning which an adjudication here is final. * * *

Under this statute (Twenty-fifth section of the Judiciary Act) the express ruling is that the court is confined to an examination of the questions arising under the laws of the United States, and cannot consider any distinct equity arising out of contracts or transactions between the parties. (Matthews v. Zane, 7 Wheat., 164.) It follows, therefore, that the only thing which the national court did or could decide was the validity of the respective confirmations of Brazeau and Lebeaume, under which the parties herein claim; and it was decided most conclusively and unequivocally that the Brazeau confirmation, under which the plaintiff's title accrued, was valid, and that the Lebeaume confirmation, by virtue of which the defendants seek to derive title, did not embrace the land in dispute confirmed to Brazeau. In conformity with that decision, the legal title is vested in the plaintiff, and his remedy is the next question to be considered.

That ejectment is the proper and appropriate remedy, where a party has the title, to recover possession of real estate, is a principle too well established to require argument or the citation of authorities. A bill in equity is not the proper remedy to recover the possession of lands; and where there is an adequate and a complete remedy at law, a court of equity will not interpose unless upon some matters coming under some peculiar head of concurrent equity jurisdiction. (Janny v. Spedden, 38 Mo., 395.)

In those cases where it is permissible under the code to combine in the same proceeding or petition legal and equitable

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claims, the matter in equity and the action at law must be separately stated and must necessarily be separately tried. Each count must be tried by itself, according to the prescribed mode in such actions and suits. In an action at law there is a constitutional right of trial by a jury, which has no existence in equity. The courts in New York have held that an equitable cause of action to remove—as a cloud upon the plaintiff's title—a deed given by mistake by a third party to the defendants, under which, having fraudulently obtained possession by connivance with the plaintiff's tenant, he claims to hold as owner, and a claim to recover the possession of the premises may be united in the same action and asserted in the same complaint. But it is also clearly held that where legal and equitable causes of action are united under the code, as to the former, on the trial of the causes, the issues must be submitted to a jury. (*Bradley v. Aldrich*, 40 N. Y., 510; *Lattice v. McCarty*, 41 N. Y., 107.)

It has often been held in this court that in a bill to set aside a deed as fraudulent, the plaintiff cannot sue for the recovery of the possession of the land, and that proceedings instituted for the purpose of vacating title, vesting it in the plaintiff, and to eject defendant and obtain possession, are fatally erroneous on writ of error or an appeal, and cannot be sustained. When the decree is entered establishing the plaintiff's title, he must then pursue his remedy in ejectment for the possession. The defendant has a right to demand this. He has a right to have a jury pass upon the question of rents and profits, and upon other questions which may arise in that form of action.

In like manner it has been held that a cause of action in ejectment cannot be united with a cause of action for partition of the premises sued for. (See *Peyton v. Rose*, 41 Mo., 257; *Curd v. Lackland*, 43 Mo., 139; *Young v. Coleman*, id. 179; *Gray v. Payne*, id. 203; *Wynn v. Cory*, id. 301; *Jones v. Moore*, 42 Mo., 413; *Lambert v. Blumenthal*, 26 Mo., 471; *Gott v. Powell*, 41 Mo., 416.)

It is a grave error—an entirely mistaken notion—to suppose that all distinction between law and equity is abolished by our code of procedure. The line of demarkation—the great essential principles which underlie the respective systems—is inherent and exists in the very nature of things. Although legal and equitable cases are to a certain degree blended as to form, the

principles remain the same, and the court will not interfere and exert its equity powers in a strictly legal action.

This principle is almost daily acted upon in our courts, and has been the uniform course of practice ever since the adoption of our new system. In all the states where the code has been instituted, the ruling has been harmonious in the same way. The statute enacts that "there shall be in this state but one form of action for the enforcement or protection of private rights, and the redress or the prevention of private wrongs, which shall be denominated a 'civil action.'" (Wagn. Stat. § 999, § 1; R. C. 1855, p. 1216, § 1.)

In providing that there shall be but one form of civil action, the legislature cannot be supposed to have intended at one stroke or sweeping enactment to abolish the well-recognized and long-established distinction between law and equity. Such a construction would lead to perplexities and difficulties, infinite and endless in their character. The innovation extends only to the form of action in the pleadings. While the difference in form and the technicalities in pleadings have been dispensed with and the party need only state his cause of action in ordinary and concise language, whether it be under assumpsit, trover, trespass, or ejectment, without regard to the ancient forms; still the distinction between these actions has not been destroyed, but remains the same. So cases legal and equitable have not been consolidated, although there is no difference between the form of the bill in chancery and the common law declaration under our system, where all relief is sought in the same way from the same tribunal. The distinction between law and equity is as naked and as broad as ever. To entitle the plaintiff to an equitable interposition of the court, he must show a proper case for the interference of a court of chancery, and one in which he has no adequate or complete relief at law. The judgment vesting him with the legal title shows that he has a complete, appropriate and ample remedy at law by ejectment. These plain principles were entirely overlooked at the trial in the court of the common pleas, but, as before remarked, according to the decision of the majority of the court, the case was instituted and tried under a misapprehension.

In this view of the subject, we consider it unnecessary and inappropriate to discuss or render an opinion upon certain questions which have been argued by counsel. When the matters

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insisted upon are properly before this court they must be reviewed, but not till then. Wherefore it results that so much of the motion as asks for an affirmance of the judgment of the court of common please, will be overruled, and, in accordance with the mandate, the judgment of this court will be reversed, and the petition dismissed. The other judges concur.

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THE NEW YORK ICE COMPANY v. THE NORTHWESTERN INSURANCE COMPANY.

23 N. Y., 357. [1861.]

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Appeal from the Supreme Court. The action was brought on a policy of insurance against loss by fire. The complaint averred a claim on the policy for the loss, and it also averred facts from which it was claimed that an error had occurred in making out the policy. It demanded judgment for the amount of the loss; and, in case it should be necessary to the recovery that the policy should be reformed and corrected, for a further judgment as might be necessary. The case was brought to trial, at special term, before Mr. Justice Ingraham without jury, as an equity case. He was of opinion that the mistake, if any, was not in the written instrument, but in a misunderstanding of the parties, by which there was a want of concurrence of minds upon the conditions of the contract; and this he held did not present a case for relief. The plaintiff then asked to have a further trial as to their right to recover upon the policy of insurance, as it actually stood without reformation. The judge held this inadmissible, on the ground that he had no authority to try the right of the plaintiff under the policy, without a jury, nor to send the case to a jury for a second trial. He conceded that had the right to equitable relief been established, it would have been his duty to have proceeded and done complete justice; but regarding the action as purely an equitable one, held that a claim for mere legal relief could not be united. He therefore dismissed the complaint without prejudice to the right of the plaintiff to bring a new action upon the policy. The plaintiff having discovered that the time for bringing an action was limited by the terms of the policy and had expired, made an application at special term, and the judgment was so amended

as to permit him to "serve a new complaint at law." On appeal, the order allowing this amendment was reversed, at general term in the first district, on the ground that the authority of the court to amend a judgment (without a rehearing of the case) extended only to mistakes or omissions, and did not reach a case where the judgment was precisely what it was intended to be, and disposed of the whole case. The plaintiff appealed to this court, and the defendant moved to dismiss the appeal.

COMSTOCK, Ch. J.: The object of the suit was to recover the sum of \$4,000, in which the defendant, by a fire policy, insured the plaintiffs. In the complaint it was stated that a certain clause in the policy descriptive of the subject of insurance was inserted by mistake, and that the defendants, taking advantage of that clause, had refused to pay the loss. The prayer of the complaint was for the recovery of the \$4,000; and, if necessary, that the contract be reformed by striking out the clause in question. The case was tried before Mr. Justice Ingraham, who dismissed the complaint. The decision proceeded solely on the ground that the plaintiffs had not made out a right to have the contract reformed; but no determination was made that the plaintiffs were not entitled to recover on the policy as it actually was. The learned Justice was of the opinion that such a recovery could not be had without instituting a new suit, and the judgment was accordingly without prejudice to the right of bringing another action. But the plaintiffs afterwards ascertained that, by a provision in the policy, actions must be brought within twelve months after a loss, and that it was too late to begin *de novo*. They then moved the special term to amend the order of dismissal, by inserting leave to file a complaint "at law" in the same action, and an order granting such leave was made. From this order the defendants appealed to the general term, where the same was reversed, and from the order of reversal the plaintiffs appealed to this court. The defendants move to dismiss this appeal.

I confess myself unable to see why the plaintiffs were not entitled to a reformation of the contract. The learned justice who tried the case, in the opinion given by him, after referring to the evidence, observes: "The only conclusion I can adopt on this evidence is that there was a mutual mistake as to the description of the premises arising from a misunderstanding of the parties in the original negotiation of the contract, and

that the defendants' agent in making the policy made it as he intended it should be when he agreed to insure the property. The policy was made according to his description entered by him in the books of the company," etc. Now, if the misdescription of the subject of insurance was material, and was entered in the books of the company, and found its way into the policy in consequence of a mutual mistake or misunderstanding of the parties, it seems to me that a proper case was made out for a reformation of the contract.

In the next place, I am of opinion that it was erroneous to turn the plaintiff out of court on the mere ground that he had not entitled himself to the equitable relief demanded, if there was enough left of his case to entitle him to recover the sum in which he was insured. No suggestion was made that the complaint did not show a good cause of action for this money, even after striking out all the allegations and the prayer on the subject of equitable relief. But because it contained those allegations, and because those were tried without a jury and tried unsuccessfully, the court refused to entertain the case for the relief to which the plaintiff was in fact entitled, that is to say, for the recovery of the money without reforming the contract. This ruling proceeded wholly on the authority of the case of *Reubens v. Joel* in this court (3 Kern., 488), which, it is intimated, was a departure from previous cases also in this court. But this is a mistake. In that case a debtor had made, as it was alleged, a fraudulent assignment of his property; and a creditor, by simple contract, commenced a suit against the assignor and assignee praying a recovery of his debt, and for an injunction to restrain the alienation of the property assigned. The question in the case arose on demurrer, put in by the assignee, and the point determined in this court was, that such a creditor was not entitled in such a case to equitable relief by injunction. We all thought that the creditor had no standing in court, legal or equitable, as against the assignee, until after judgment against his debtor, and whatever was said beyond this is to be taken as individual opinion merely. The doctrine of the previous cases (2 Kern., 266; *id.*, 336), favorable to uniting in the same action legal and equitable grounds of relief, was not intended to be disturbed; and a case in this court of a later date has reaffirmed that doctrine in the most explicit manner. (*Phillips v. Gorham*, 17 N. Y., 270.) In this case the point was very

distinctly presented, and it was decided upon the fullest consideration. I think it proper to mention that the reason why I expressed no opinion in the case was, that I hesitated in regard to the power of the legislature under the Constitution to abrogate all the distinctions between legal and equitable actions. That such was the expressed intention of the legislature in the Code of Procedure, I never had any doubt. Both of these questions must now be considered at rest.

And in the next place, I do not see the grounds upon which the court below, in general term, reversed the order of the special term, giving to the plaintiff the right to put in a new or amended complaint in the action. I think the complaint was perfectly good, and that no amendment or substitution was necessary. It was much more clearly good in the so-called legal than in the so-called equitable aspect of the case. Nevertheless, the court corrected the judgment by adding the words, "or the plaintiff may serve a new complaint at law in this action on payment," etc. The judgment was entered December 23, 1859; notice of the motion for leave to add this clause to it was given in February following, and the order granting leave was made in July following. It is suggested in the opposing papers that the judgment had become perfect and final before the motion was made. I do not see the force of this suggestion. The judgment was perfect as soon as pronounced and entered. It would become final when the time for appealing should expire, but there is no pretence that this was ever limited by serving on the plaintiffs the notice required for that purpose. (Code, § 332.) I think the power of the court to modify or amend the judgment cannot be questioned. Even if the time for appealing had expired I am by no means prepared to admit that this power would be lost. At all events, so long as the judgment was subject to an appeal, it was subject to such corrections and modifications as the court which pronounced it might in its discretion think proper to make. The administration of justice would be extremely imperfect if this power did not exist. In this case the complaint had been dismissed at the trial, because the plaintiffs had failed (as the court thought) to prove the equitable ground of relief which he had alleged. By the modification afterwards directed, leave was given to file and serve a different, that is to say, an amended complaint. The judgment then was no longer absolute, but it would become so unless

the plaintiff, within twenty days, amended his complaint, and paid the specified costs. If an amendment was thought necessary this would have been extremely proper as an original disposition of the case at the trial. As the time for bringing a new suit had expired, justice plainly required that the case should be put in this situation; and as it was not so done at the trial, it was just that the omission should be supplied afterwards.

In the next place, I am of opinion that the Supreme Court had no right to entertain the appeal at all from the order of the special term. That order, in its substance and nature, simply allowed a pleading to be amended in furtherance of the justice of the case. Such orders rest in the discretion of the court which makes them, they involve no substantial right and they are not reviewable on appeal. They do not belong to either class of orders which, according to the Code, may be re-examined at the general term. (Code, § 349.) As incidental to the amendment applied for in this case, it was necessary to modify the judgment in its absolute character. But this was only a part of the discretion to be exercised on the application. Not even in this view was any substantial right involved, because it was merely a question of practice whether the legal merits of the case should be tried under an amendment of the pleading or in a new action. Leave to bring a new action had been originally given. The amendment simply gave leave, in the plaintiff's election, to go on in the same action after reforming his complaint. In all this I see nothing but practice and discretion which afforded no ground for review.

But the inquiry remains whether the order of reversal, pronounced at the general term, can be reviewed in this court. We regret to find that there is no provision of law which authorizes such an appeal. The order appealed from does not, we think, "in effect determine the action and prevent a judgment from which an appeal might be taken." (Code, § 11, sub. 2.) On the contrary, it leaves in force a judgment in the action rendered upon the trial, from which an appeal might be taken, and, so far as we know, may still be taken. The case, therefore, does not seem to be embraced in any of the subdivisions of the 11th section of the Code, which is the only authority for appeals to this court. The appeal must, therefore, be dismissed, but without costs.

Appeal dismissed.

This is not good case

ANDERSON v. CHILSON.

8 S. D., 64. [1895.] *1/10 fine with judgment*

FULLER, J.: As disclosed by the complaint, the substantive facts upon which plaintiff prays for an accounting with all the defendants, are as follows: Plaintiff was the administrator of an estate, and defendants were sureties upon his bond. Defendants, being called upon to make good an apparent shortage of \$1,200, as shown at that time by plaintiff's accounts with the estate, demanded and received from said plaintiff, to hold only as security for any money which they might be required to advance on account of such deficiency, a certain stock of general merchandise, of the alleged value of \$1,338, owned by a co-partnership of which plaintiff was a member, and which was turned over by plaintiff with the consent of his co-partner, together with plaintiff's undivided one-half interest in various other items of personal property described in the complaint, and aggregating in value the sum of \$4,000. That, upon the delivery of said property to defendants, nothing whatever was paid, and the only purpose thereof and consideration therefor were to secure and protect the defendants against liability upon said bond. That plaintiff was never \$1,200 short in his accounts as administrator, and that at a final settlement of all matters and proceedings relating to said estate, the probate court found that \$458.88 was the exact sum required to balance said accounts, and relieve plaintiff and the defendants from all further liability upon said administrator's bond. That said sum of \$458.88 was the only amount ever paid by the defendants in the capacity of sureties, or otherwise in plaintiff's behalf; and that their liability upon said bond has ceased, and plaintiff, as administrator, has been discharged. The complaint concludes as follows: "Plaintiff further alleges that said defendants have taken all of the goods, wares, and merchandise, book accounts, notes, live stock, and coal, hereinbefore named, into their own possession, and have sold and disposed of the same for their own use and benefit. Plaintiff further alleges that the defendants have collected, as plaintiff is informed and believes, nearly the entire amount of the book accounts and notes heretofore named. Wherefore plaintiff prays judgment that the defendants be compelled to account with him touching the premises,

and ordered to pay over to plaintiff any balance found in their hands coming to him, and for such other and further relief as to the court may seem proper, together with costs and disbursements of this suit."

For a determination of the issues of law and fact presented by the pleadings, the case was referred to H. H. Potter, Esq., and the evidence offered and received under the separate answer of the defendant Chilson amply sustains and justifies the following findings of fact and conclusions of law, upon which was entered the judgment of dismissal, and for costs against plaintiff, and in favor of defendants, from which plaintiff appeals. Findings of fact: (1) "I find that the property alleged to have been delivered by plaintiff to defendants was not delivered as security, as alleged in the complaint, but was in fact sold to the defendant Chilson. (2) I find that such sale was with the knowledge and consent of Sorum, plaintiff's partner. (3) I find that the agreed price for the goods in question in said action which were sold to defendant, Ole A. Chilson, was the sum of nine hundred and seventy-five dollars. (4) I find that it was agreed to between the plaintiff and the defendant, O. A. Chilson, that the purchase money of said goods should be applied in liquidation of the liabilities of defendants as sureties upon a certain undertaking given by them to the plaintiff as administrator of the estate of one Evans, deceased. (5) That, of the money agreed to be paid by said Chilson for said goods, he has paid in liquidation of plaintiff's liability on his account as administrator, and on defendants' liability as bondsman for said administrator, the sum of four hundred and fifty-eight and 88/100 dollars, and no more." Conclusions of Law: "(1) That plaintiff be denied the relief demanded in his complaint, and defendants have judgment for their costs in this action."

That the various and numerous items and articles of personal property belonging to appellant, and described in his complaint, were pledged to respondents, who were co-sureties upon his bond, to secure and indemnify them against loss arising from the failure of appellant to fully account for the estate of which he was administrator, was the theory upon which he sought to establish a fiduciary relation between himself and the several respondents, entitling him to the equitable remedy of an accounting. Although none of the material averments of the com-

plaint were proved at the trial, and the evidence established an unconditional sale and delivery of the property to Chilson, instead of a delivery in trust to Chilson and his co-respondents, it is urged by counsel that, upon the facts as found, their client was entitled to a judgment for the difference between the purchase price agreed upon and the amount which has been paid by Chilson to the use and benefit of appellant. As a determination of the point thus presented is decisive of the appeal, other questions discussed in the briefs of counsel will require no attention.

The facts as found being supported by the evidence, and entirely inconsistent with the cause of action stated in the complaint, appellant was not entitled to a money judgment against Chilson, although the findings of fact would support an inference that a portion of the purchase price agreed upon had not been paid. The issues tendered by the complaint being addressed to the equity side of the court, followed by a prayer for an accounting with the numerous persons named and therein charged in a fiduciary capacity, the case was sent to a referee, and a trial thereof disclosed a case for a jury, and established a state of facts which, if proved in an action at law, would entitle appellant, a vendor of personal property, to recover from one of the alleged trustees, but in fact a vendee of goods, wares, and merchandise, the balance due upon the purchase price thereof.

When a complaint is framed for equitable relief, and it appears upon the trial that the pleader is not entitled thereto, a judgment at law inconsistent with the allegations of the complaint, for damages upon a breach of contract to pay a stipulated amount of money, cannot be entered, and the complaint must be dismissed. It was held in *Dalton v. Vanderveer* (Sup.) 29 N. Y. Supp. 342: "Where a complaint states a cause of action which is within the jurisdiction of equity, and is not an action at law, and the evidence given on the trial fails to sustain such equitable cause of action, but shows a cause of action at law, the complaint will, nevertheless, be dismissed, as a distinction between equitable and legal actions still exists, though the forms have been abolished." From the headnote in *Parish v. Railroad Co.* (Fla.) 9 South. 696, we quote the following: "There can be no recovery upon a cause of action, however meritorious it may be, or however satisfactory proved, that

is in substance variant from that which is pleaded by the plaintiff." To the same effect, see *Lewark v. Carter* (Ind. Sup.) 20 N. E. 119; *Bradley v. Aldrich*, 40 N. Y. 504; *Homer v. Homer*, 107 Mass. 82; *Park v. Lide*, 90 Ala. 246, 7 South. 805; 18 Am. & Eng. Enc. Law, p. 515. The principle that plaintiff must recover, if at all, upon the cause of action alleged in his complaint, is elementary. The record discloses no error, and the judgment appealed from is affirmed.

BARLOW v. SCOTT.

24 N. Y. 40. [1861.]

Appeal from the Supreme Court. The complaint set forth a contract for the conveyance by the defendant to the plaintiff of forty acres of land by a good warranty deed. It averred that the defendant had tendered a deed which contained only a covenant of warranty against his own acts, which the plaintiff refused to receive; that the defendant had no title to the land, but that it was in the possession of a third person, who held it adversely under a valid title. It prayed for a specific performance of the contract, or for damages. The defendant denied the contract to convey with general covenant of warranty. The trial was before a judge without a jury. The case did not show whether this was by consent, nor that any objection was taken to that mode of trial. The judge found the facts, and the same are sufficiently stated in the following opinion, and ordered judgment for the plaintiff for \$500 damages. The judgment having been reversed, and a new trial granted at general term in the sixth district, the plaintiff appealed to this court.

LORT, J. (After reviewing the evidence). These considerations lead us to the conclusion that the defendant was bound to grant and convey the premises in question to the plaintiff in fee by a good warranty deed.

This conclusion is in accordance with right and justice, and is sustained in principle by authority. (Story on Contracts, §§ 13 and 13a; *Wiswall v. Hall*, 3 Paige, 318; *De Peyster v. Hasbrook*, 1 Kern. 583, 590; *Alexander v. Vane*, 1 Mees. & Wels. 511.) The defendant has failed and refused to comply with that obligation. Not only is the deed tendered insufficient in

form, but it also is found that at the time it was tendered the premises were in the possession of another party; and that the same were then, and since have been, held and occupied by such party under deed thereof, and claiming title thereto adversely to the title of the defendant and those under whom he claims. His deed, therefore, would be void as against the party claiming adversely, and would not confer the right of possession or any title under which possession could be recovered; and the court properly refused to give judgment directing a conveyance.

It is, therefore, a case where the plaintiff is entitled to damages for the non-performance of the agreement, and the remaining question to be considered is whether they are recoverable in this action. The complaint is framed for the specific performance of the agreement, and in default thereof for compensation in damages. It, after setting forth the terms of the contract sought to be enforced alleges that the plaintiff has no valid title or interest in the land in question, and that the same is in the possession of another party, holding the same under a good and valid title. It was therefore, a case where the facts alleged were not sufficient to justify a decree for specific performance, and it may be conceded, as stated in the opinion of the court below, to have been a well settled rule under our former judicial system, that a court of equity where such relief only is obtainable, would not have retained the suit for the purpose of awarding a compensation in damages, for the non-performance of the contract to convey; for the reason that actions for damages only were properly cognizable in courts of law, in which a perfect remedy could be had. Under our present arrangement the same court has both legal and equitable jurisdiction, and if the facts stated by a party in his complaint are sufficient to entitle him to any of the relief asked, and an answer is put in putting these facts in issue, it would be erroneous to dismiss the complaint on the trial merely because improper relief is primarily demanded. It is competent for the court, under such circumstances, to grant any relief consistent with the case made by the complaint and embraced within the issue (section 275 of the code) and the statement of the right of the plaintiff and its infringement by defendant constitute such case as stated by Johnson, J., in *Marquat v. Marquat* (2 Kern, 333, 341); *Phillips v. Gorham*, (17 N. Y. 270); *Truscott v. King*, (2 Seld. 165); *Wiswall v. Hall*. (3 Paige 314); *LeRoy v. Platt* (4 id. 77);

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The New York Insurance Company v. North Western Gas Company (21 How. Pr. 296, 298). These are the only questions properly presented on the appeal.

It is, however, insisted by the defendant, that it was erroneous for the court to order judgment for the plaintiff on a trial of an issue without a jury. There is nothing in the case to show that the action was so tried against or without the defendant's consent. The objection does not appear to have been made at the trial, and if it was, the fact should have been stated in the case, and not appearing there it cannot be urged in this court as a ground for reversing the judgment. (Greason v. Kreteltas, 17 N. Y. 491.)

The result of these views is that the judgment of the general term should be reversed and that of the special term affirmed with costs, in the supreme court, but without costs to either party on this appeal.

Judgment at general term reversed, and that at special term affirmed.

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BRADLEY v. ALDRICH.

40 N. Y. 504. [1869.]

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Appeal from the judgment of the supreme court, at general term, in the sixth district, reversing a judgment for the plaintiff at special term, and dismissing the plaintiff's complaint with costs, without prejudice to the right of the plaintiff to bring an action for damages for fraud, if he shall be so advised.

The complaint avers the making of an agreement by the plaintiff with the defendant, Aldrich, by which the plaintiff was to convey to the defendants (Aldrich & Stone) a farm of seventy-five acres in the town of Vestal, and to deliver to one or both of the defendants forty-four sheep; and was to receive therefor, as payment, four village lots in Binghampton, a bond and a mortgage, made by one Finch, for \$300, and \$175 in money; which agreement was carried into complete execution.

The complaint further avers that the plaintiff was induced to make this exchange of property, and did make the exchange in reliance upon various false and fraudulent representations and concealment of the truth, he being ignorant of the situation and

entitled to equitable relief-

value of what was represented by the defendant as four village lots, viz.: The representation that the property in Binghampton consisted of four village lots when, in truth and in fact, it was one village lot of ordinary size only. The representation that the said four village lots were well situated, and three of them were each worth \$300, and the other was worth \$400, and was, at that time, under contract for sale thereof, to a responsible purchaser, at that price; whereas, the whole was of no greater value than \$200, in truth; and although the defendant Aldrich had made a contract for the sale of one-fourth thereof at the price of \$400, such contract was made with a colored person who was poor, and without means of payment; and the whole property, by reason of the occupation of the one-fourth by the said purchaser, was rendered unsalable and nearly valueless. And it is, therefore, averred that the said piece of land was wickedly and deceitfully imposed upon the plaintiff, in part payment of his farm, by the fraudulent misrepresentations and concealments of the defendant, Aldrich.

It is also averred that the defendant, Stone, was a party to the fraud; a participant in the exchange and in the fraudulent concealment of the truth. That, upon discovering the facts, the plaintiff offered to re-convey and redeliver all that he had received, and demanded a reconveyance to himself of the farm.

The plaintiff, upon these allegations, demanded judgment, declaring the agreement for the exchange fraudulent and void. That Aldrich or Aldrich & Stone be required to accept a reconveyance of the village land, a reassignment of the Finch bond and mortgage, and \$175 in money, and be required to reconvey to the plaintiff his farm; or that the plaintiff's deed thereof to them be declared void and be canceled; and the plaintiff be awarded compensation for the rents and profits and use and occupation of the farm while in the defendant's possession, and for any waste committed thereon; and that the defendant may have such other and further relief as shall be found necessary to work full and complete justice and equity in the premises.

The answer denied, in detail, the allegations which imputed any misrepresentations, concealment or fraud to the defendants, and gave a detailed account of the negotiation, and exchange, the location, condition and value of the property, and the knowledge of the plaintiff of all the material facts, when the exchange was made.

The action was brought to trial before the special term, and the evidence offered by the parties, respectively, being received, the judge filed a decision, detailing briefly the evidence, reviewing its force and effect, declaring that the plaintiff had failed to satisfy him of the fraud alleged, with one exception, viz.:

He finds and holds that "Aldrich falsely represented him" (the purchaser of the one-fourth of the village land) "to be good, and for this he is liable, and the plaintiff is entitled to damages for whatever he has in that respect alone sustained; and for the purpose of ascertaining such damages, there must be a reference to Judge Griswold to take proofs and report." To this, the defendant, Aldrich, excepted.

The actual value of the said one-fourth of the village lot having been ascertained, judgment was rendered for the plaintiff for the difference between the value and the sum which was payable by the contract for the sale thereof, viz.: \$113, and the costs of the action.

From that judgment the defendant appealed to the general term, and the judgment was there reversed and the plaintiffs' complaint dismissed with the costs to the defendant, but without prejudice to the right of the plaintiff to bring an action at law, if so advised.

Thereupon the plaintiff appeals to this court.

WOODRUFF, J. (Part of the opinion omitted.)

No exception was taken by the appellant to the ruling of the court in receiving or rejecting testimony. The exceptions taken to the decisions of the court, are mainly to the findings of fact.

But the exceptions may be said to present a question of law or perhaps two questions of law in this, that the appellant below excepts to the conclusion that the defendant is liable, and the plaintiff entitled to the judgment for damages sustained by reason of the false representations that Webb, the said purchaser, was good, and the award of the reference to ascertain such damages. And the ground stated in the exception is that such decision is against law and the uniform practice of courts of equity. That the justice had not jurisdiction to order such a reference; that the court, after there was an express finding that there was no ground for equitable relief, had no right to try a simple question of fraud, and assess or cause to be assessed,

the damages therefor; but that a trial of such an issue could (unless the defendant consented) only be tried by a jury.

It is clear that this action, begun and tried as an action in equity seeking upon various allegations equitable relief, and equitable relief only, viz.: the rescission of an agreement and the restoration of the parties to their former condition, has ended as an action on the case for deceit, and an award of damages therefor; which is "an action for the recovery of money only." (Code § 253.)

It cannot be said that the defendant, by going to trial before the court without objection, waived his right to object to the trial of a mere action to recover damages for deceit, without a jury; for the action was not "an action for the recovery of money only" (Code, 253), but for special equitable relief, and was therefore "triable by the court" (Code 254). He therefore had no alternative, and had no right to object to the trial of the cause by the court.

Scott v. Barlow, (24 N. Y. 40), does not conflict with this view. There the complaint was "framed for the specific performance of an agreement, and in default thereof, for compensation in damages." The opinion pronounced in that case, held that on the face of the complaint there was no ground for specific performance, and the case in truth therefore presented a cause of action for damages, and nothing more. The defendant therefore went to trial, to meet that precise claim. Greason v. Keteltas (17 N. Y. 491), was like Scott v. Barlow in that respect.

It does not appear that the plaintiff at any time treated the action as brought to recover damages. No such idea could be suggested by the complaint; no such claim appears to have been made at the trial. The plaintiff does not, in his complaint, aver that he has sustained any damages from the representation, and it is quite obvious that he did not prove or attempt to prove his damages from this cause, else a reference to ascertain whether he had sustained any, and how much damages, would not have been necessary.

It is certain that the former practice of the court of chancery furnishes no warrant for such a proceeding. When all ground for equitable interposition failed, the bill was dismissed; and if a cause of action at law appeared to arise out of the transaction, which rested in no equitable, but simply in legal

jurisdiction, the party was left to pursue his remedy in the appropriate forum.

The code, however, in section 275, provides that, "the relief granted to a plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue." This section relieves the plaintiff from any technical objection that he has not prayed for the precise relief to which on the trial it may seem he is entitled, but the relief to be granted must still be consistent with the case made by the complaint.

And in construing and applying this section, another, equally peremptory, must be kept in view, which rests upon the right to trial by jury, secured to the party by the constitution. By section 253, "An issue of fact, in an action for the recovery of money only, must be tried by a jury, unless a jury trial be waived," as provided in section 266.

Now it was not the intent of section 275 to violate this section, and enable a plaintiff to compel a trial by the court, by merely alleging some ground for equitable relief, and, failing in that, have a trial of issues in an action for fraud, and have an assessment of damages therefor without a jury. Nor will it warrant the court in disappointing the expectation and claims of both parties, trying the action and deciding it, so far as it is equitable in its nature, by denying the plaintiff's claim; and then selecting of facts found some which may warrant an action for damages, which the plaintiff has neither alleged nor claimed, and then order an assessment by a referee, and judgment for such damages as may be ascertained and assessed.

The defendant here had a right to a trial by a jury of the question which the judge, at special term, gave judgment against him; he had a right to know, in some stage of the action, that some claim for damages, on the ground of fraud, was made against him; he was entitled to an opportunity to object that, as to such an issue, he was entitled to a trial by a jury, and to demand such a trial.

According to the record before us, he was not apprised of any such claim until its declaration, and its maintainance appeared in the decision of the judge; and to that he excepted, which alone he could do.

The opinion in this court, in *Mann v. Fairchild* (2 Keyes, 111,

et seq.) is that "if a party brings an equitable action, even now, when the court administers both systems of law and equity, the party must maintain his equitable action upon equitable grounds or fail, even though he may prove a good cause of action at law on the trial. (See, also, *Heywood v. Buffalo*, 14 N. Y. 540.)

If it were material it might be further suggested that the decision of the judge does not itself show a cause of action for which the damages could properly be awarded. His finding is simply that "Aldrich falsely represented him" (Webb, the purchaser of one of the lots) to be good; and for this he is liable, and plaintiff is entitled to judgment for whatever damages he has, in that respect, sustained." Here is no finding of any fraud; no finding that the plaintiff was deceived, nor of any intent to deceive, though deceit is of the gist of such an action, and no finding that the plaintiff sustained any damages.

It may be true that where two causes of action, one legal and one equitable in their nature, are stated in the same complaint, the court may try the cause, and if the defendant, having just opportunity, does not demand a jury for the trial of such of the issues as the code and the constitution both require to be tried by the jury he may be held to waive a trial by a jury. But he must have just opportunity before the waiver will be implied, and it is not to be overlooked that the code itself, declaring how a jury trial may be waived, does not make mere appearance such a waiver, but "Oral consent in open court, to be entered in the minutes."

If it could fairly be said that the present complaint stated two causes of action, of which one was for damage for deceit, it would have been, probably, within the power of the general term to reverse the judgment, and order the issues in that respect, to be tried by a jury. That may be done where causes of action, legal and equitable, are properly united in the same complaint.*

But I do not think that this action presents such a case, and the judgment appealed from should, therefore be affirmed with costs.

HUNT, Ch. J., MASON, JAMES and DANIELS, JJ., were for affirmance on the grounds stated in Woodruff's opinion.

* For cases dealing with the union of legal and equitable claims, see chapter III, sec. 3.

MASON, J., also thought the case came under section 171 of the code, and there was a total failure of proof under that section.

GROVER, J., thought the code authorized the uniting of legal and equitable causes of action arising out of the same transaction. In this case the general term should have ordered a new trial. The order should be affirmed as to the reversal of the judgment, and reversed so far as it ordered final judgment for the defendant.

The order was affirmed on the ground that the complaint did not state any other cause of action than the equitable one, and there was a total failure of proof as to that.

The court agreed, unanimously, that causes of action, both legal and equitable, arising out of the same transaction, may be united by proper allegations in the complaint.

Order affirmed, and judgment absolute for the defendant.*

Section 3. Special Proceedings.

The word "action," as used in the New Revision of the Statutes, when applied to judicial proceedings, signifies an ordinary prosecution, in a court of justice, by a party against another, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.—*N. Y. Civ. Proc. Sec. 3333.*

Every other prosecution by a party, for either of the purposes specified in the last section, is a special proceeding.—*Ibid. Sec. 3334.*†

XBENOIST v. MURRIN.

48 Mo. 48. [1871.]

CURRIER, Judge, delivered the opinion of the court.

This was a proceeding under the statute (2 Wag. Stats. 1368, § 29), to contest the validity of a paper produced and proved in the St. Louis Probate Court as the last will and testament

* See also *Porter v. International Bridge Co.*, 79 N. Y. S. 434.

† The Missouri Code has no corresponding provisions.

of the late Louis A. Benoist. After the case had been pending for some time in the St. Louis Circuit Court, and subsequently to the framing of issues, or rather the issue of *devisavit vel non*, the petition was dismissed without prejudice to the contestants' rights and upon their motion. The contestees thereupon moved to set aside the order of dismissal, and to reinstate the cause so that they might proceed to make proof of the will in solemn form, as it is called. The motion was overruled, and the contestees bring this case here by appeal. Whether the court was warranted in dismissing the petition in the manner stated, is the question presented by the record for consideration.

If this were an ordinary suit between litigating parties, over which the circuit court had original jurisdiction, there could be no doubt of the right of the plaintiffs to dismiss or take a nonsuit at any time prior to the final submission of the cause to the court or jury. (Gen. Stat. 1865, p. 662, § 47; 40 Mo. 178; 43 Mo. 321; Fink v. Bruhl, 47 Mo. 173.)

But this is not an ordinary suit, nor had the circuit court original jurisdiction of its subject matter. The original jurisdiction was with the Probate court, where the will was originally probated and ordered to record. The proceedings were in rem, operating directly upon the will—the *res*; and the transfer of the case to the circuit court did not change its character, or the character of its subject-matter. The effect of the contestants' petition and the proceedings under it was to transfer that subject matter from the Probate to the Circuit Court for adjudication in the latter court. There was no appeal in form, but the result of the process was the transference of the contest from an inferior to a superior court; and that may be done without a formal appeal, as was decided by this court in *Dickey v. Malachi*, 6 Mo. 182, and where it was also held that the jurisdiction of the circuit court in cases like the present is not original. The jurisdiction not being original, it must be derivative, in effect as upon an appeal.

If the statute had provided for a transfer of this class of cases from the inferior to the superior court by appeal, and the case had been brought up in that way instead of by petition, no one would claim that the proceedings could be dismissed at the instance of the contestants without prejudice to them—that is, without an affirmance of the prior judgment.

In *St. John's Lodge v. Callender*, 4 Ired. 342, the party pro-

Proceedings
for proving
a will. Con-
testants
moved to dis-
miss, &
contestees
appealed from
the dismissal.
Question!
Can petition-
ers not be
dismissed
on motion

Here the
circuit court
had appeal
jurisdiction

posing to establish the will moved for leave to take a non-suit, and the motion was overruled by the trial court, and its action was sustained by the supreme court of North Carolina. In delivering the opinion of the court, Ruffin, C. J., discusses the subject as follows: "We are not sure that we understand what was meant by the appellants asking leave to suffer a non-suit as the term is not appropriate to proceedings in the Probate Court. But from analogy to actions at law, we suppose the object was to withdraw from the court before a verdict was rendered on the issue *devistavit vel non*, so as to prevent the delivery of a verdict, and leave the party at liberty to institute another proceeding of the same kind. If so, we think it inconsistent with the proceeding of this sort and contrary to the nature of the jurisdiction of the court of probate. The instrument propounded is always brought into court in the first instance, and the jurisdiction is in rem. The inquiry is whether the party deceased died testate or intestate; and if the former, whether the script propounded be his will or a part of it or not. When once regularly raised, the court must pronounce on these questions without reference to the presence of this or that person. If a case is about to be heard or under a hearing and a party in interest is not furnished with full proof and has been surprised, his course is, for cause shown, to get an order for opening the case to further proof and deferring the pronouncing of sentence. It is analogous to the trial of an issue out of chancery, only one is at the instance of the chancellor to satisfy his conscience, and the other the law compels the court of probate to make up in every case of a disputed will. From the nature of an issue, he who alleges the affirmative opens the case, and for that reason the party propounding the will is commonly spoken of as plaintiff. But it is inaccurate; for, properly speaking, there is neither plaintiff nor defendant, but both parties are equally actors in obedience to the order directing the issue. In neither case is the party in the affirmative at liberty to withdraw and defeat a trial more than the party in the negative."

In North Carolina it seems that the issue *devistavit vel non* is made up in the probate court and sent to the superior court for trial; while with us the same issue is framed upon the contestants' petition. But this can make no difference with the proceedings subsequent to the making up of an issue. In either

case the proceedings is *in rem*, and strictly of probate jurisdiction.

In Missouri and in a number of other states there are two modes of proving a will, one provisional and the other final. The first is denominated the common form, the second the solemn form. A will is proved in the common form when it is presented, proved and ordered to record, as provided in the thirteenth section of our statute of wills. That is or may be done in the absence of the parties in interest, and without citing them to appear. The validity of the will may nevertheless be contested, and the proof of it in solemn form required. ‘(When a will is proved in solemn form,’ says Nisbit, J., in *Brown v. Anderson*, 13 Ga. 176, “it is necessary that all parties interested be cited to witness the proceedings, that the will be produced in open court, that the witnesses be there examined, and that all parties in interest have the privilege of cross examination;” and that, in substance, is what is contemplated in the twenty-ninth section of our statute of wills. The proof in solemn form in this state is required only when a contest arises, and then the case is transferred to the circuit court in the mode provided by law (§ 29) as was done in the case at bar. The question here is—all the requisite parties being before the court, and every preliminary step having been taken—whether it lies with the contestants to defeat the whole proceeding by a voluntary non-suit or dismissal.

In my view every consideration of public policy is against the allowance of such claim. It is opposed to the authorities and in conflict with the policy and nature of probate proceedings of this character. It has repeatedly been held that the propounders of a will—those in the affirmative—cannot take a non-suit, that it is the right of the contestants in such cases to insist on a verdict. (*Roberts v. Trawk*, 13 Ala. 86; *St. John’s Lodge v. Callender*, supra; *Whitefield v. Hurst*, 9 Ired. 175; and see *Burrows v. Ragland*, 6 Humph. 484-5; *Etheredge v. Idley*, 1 Bradf. 95; 2 Redf. Wills, 28, § 2 and note.) If the contestants may insist on the proceedings going forward to verdict, certainly those on whom it is the burden of establishing an instrument assailed and drawn in question by the action of the contestants, ought to have the same privilege.

I think the circuit court should have disposed of the case upon its merits, and not permitted the contestants to go out of

court without prejudice. It was exercising a branch of probate jurisdiction, and ought to have proceeded as it would have been the duty of the court of probate to have done had the statute authorized the same proceedings in the latter court, and the contest had been there pending.

The judgment will be reversed and the cause remanded. The defendant's motion will be sustained and the cause reinstated upon the docket of the circuit court. The other judges concur.*

for def.

LUCAS v. LUCAS.

69 Mass. 136. [1854.]

SHAW, C. J. At a former term of the court, the petitioner in the present case libelled his wife to obtain a divorce *a vinculo* for the cause of adultery, and upon a trial, judgment was rendered that the libel be dismissed. This, from the nature of the subject matter, must be deemed a final judgment against the libellant. Afterwards, this petition for a review was filed by the husband in order to have a new trial. At the hearing at *nisi prius*, the judge before whom it was brought was of opinion upon the evidence that there was sufficient ground shown for granting a review, if the court had authority to grant it; and this is the question reserved.

It is insisted on the part of the petitioner, that this court has authority to grant reviews in all civil actions, and that a libel for a divorce *a vinculo* is a civil action, because it is a judicial proceeding, in which one person seeks against another the redress of a private wrong or injury. The question depends on Rev. Stats. c. 99, §§ 1, 19.

It would hardly be safe to decide a question of this magnitude upon a mere brief definition, without regard to the subject matter, the obvious objects and purposes of the law, and the antecedent legislation on the subject. And it would seem to be peculiarly the duty of the court to hesitate long before putting such construction upon a statute which has been long in force, and where there is no precedent for applying the law and practice of reviews in the case of divorce. For, though the re-

*Accord: Re Joseph's Estate, 118 Cal., 660.

vised statutes now in force were passed comparatively a few years since, they were re-enactments of laws which had been in force nearly half a century. Sts. 1788, c. 11; 1791, c. 17.

It may be, that the term "civil action" in some respects, and to some purposes, may, without violence to the language, be held to include proceedings for divorce; and yet all laws respecting civil actions may not so apply as to include these proceedings. This results necessarily from the uncertainty and ambiguity of language. The fact that there has been no practice of allowing the review of decrees of divorce, and that this is a novel, if not an unprecedented, proceeding, is strong evidence of what the general understanding of the law on this subject has been; but this, of course, is not conclusive.

It will be recollected that at the time of the adoption of the constitution, and for several years after, proceedings for divorce were not within the jurisdiction of courts of law, but of the governor and council, who proceeded according to the forms and principles of ecclesiastical courts; and even when this jurisdiction was transferred by Stat. 1785, c. 69, § 7, it was given exclusively to the supreme judicial court, acting as an ecclesiastical court, and it was declared that the decree of the same court should be final.

Mr. Dane, who speaks of review in civil actions as depending on Massachusetts statutes, speaks of it as limited to a case where there has been a verdict, and to a suit commenced by a writ, and not by petition or complaint. 6 Dane Abr., 453, 454. It was held in several early cases in Massachusetts that, to warrant granting a review, the action must have been commenced by writ, and the judgment rendered on a verdict. *Borden v. Bowen*, 7 Mass., 93; *Stone v. Davis*, 14 Mass., 360. Perhaps that would now be holding the matter rather too strictly; *Sturdivant v. Greeley*, 4 Greenl., 538; but it indicates the prevailing conviction among lawyers and judges in regard to these laws, after they had been in operation many years. Looking then beyond the mere philological sense of the term, "civil action," as used in this clause of the revised statutes, we find that a process for divorce is in a certain sense a judicial proceeding; but that originally this jurisdiction was not vested in the courts of common law; that the trials and proceedings were not according to the course of the common law; that, though in a certain sense the object of a libellant is to obtain redress for a grievance or

private injury, yet that is not by way of recovery of damages or obtaining property, real or personal, but rather for the purpose of ascertaining and declaring authoritatively the status and social conditions of a party, upon which numerous and most important social and personal rights and duties are made by law dependent. It is of the highest importance, not only to the security of parties but to the peace of society, that the relation of every party, either as married or otherwise, be at all times distinctly understood. In ordinary cases of review of civil actions, the object is not merely to reverse or affirm a former judgment; but the original judgment may be altered or modified, enlarged or reduced, and the party reviewing may have judgment to recover back, in whole or in part, as the various circumstances of different cases may require. But if a review were to lie on a final decree of divorce, it could only be to reverse or affirm the former judgment. The court, in the judgment on review, would in effect render such judgment as the court should have rendered in the former case; so that the new decision would in effect relate back to the former, and determine the relations and the consequent rights and duties of parties, as from that time.

*consideration
which
would allow
an appeal
divorce
cases.* The alarming and dangerous consequences of the reversal of a former decree may be more striking in a case where such former decree granted a divorce, than in one where it denied such divorce. After the divorce *a vinculo*, should the one not the guilty party marry, it would be lawful and innocent. A reversal of the decree would show that the first marriage was never dissolved, and the party marrying would be liable to the severe penalty of the law against polygamy. Should personal property accrue to the wife, in the meantime, it might be trespass or even larceny for the husband to take possession of it; and yet a reversal of the decree of divorce would show that he had a good title and perfect right to take it. Not only might parties be exposed to punishment as for crimes, but the rights of husband, of wife, of children, to support and maintenance, and the rights of third parties towards them, would all be left in doubt, and this sometimes for years, whilst the petition and the review are pending. See *Greene v. Greene*, 2 Gray, 363.

If such a decree of reversal cannot be rendered on review, when the decree sought to be reversed is a decree granting a divorce, it appears to us, though the consequences might not be

so numerous and disastrous, yet, upon principles of law and justice, the result must be the same when the review seeks to reverse a judgment refusing a divorce. Such a decree is a judicial determination, as between the parties, of the whole matter of controversy contained in the libel, and settles conclusively that no divorce ought to be granted for the causes stated, either because not sufficient in law, or not true in fact. After such a decision the parties are plainly bound, by every legal and moral obligation, to unite together in the performance of their conjugal duties to each other, and their parental obligations to their children, if they have any; all which would be impeded and delayed, if not ultimately defeated, by the pendency of a review.

For these reasons, or some of them, we think that it has never been adjudged that a writ of review may be granted by this court, on a final decree of the court, either granting or refusing a decree of divorce; and if the legislature had intended to extend the authority of the court to such a case, they would have done it by express words. But the revised statutes did not apparently intend to make any alteration of the law in this respect, but simply to reinstate the law as it stood before. The court are therefore of opinion that, though in some respects, as in taxation of costs to a prevailing party, a prosecution for a divorce may have been regarded as a civil action, yet the provision of the revised statutes relied upon does not authorize this court to grant a review of a decree dismissing a libel for a divorce.

No appeal
in divorce
cases.

*Petition dismissed.**

for def.

CHINN v. TRUSTEES.

32 O. St., 236. [1877.]

SCOTT, J.: The plaintiff in error applied to the district court of Lawrence County, for a writ of mandamus, commanding the defendants in error to execute and deliver to him a township bond of said township of Fayette, for one hundred dollars, in compliance with the requirements of Act of April 16,

*See also Powell v. Powell, 104 Ind., 18.

1867, "to authorize and require the payment of bounties to veteran volunteers," and the acts amendatory thereof.

The facts stated in this relation were such as to bring his case, *prima facie* at least, within the purview of said statute, and to entitle him to such bond. He avers in his relation that since the year 1867, he has often requested the trustees of said township, and their successors in office, including the present board of trustees, to draw, perfect and deliver to him such bond, which they have refused and still refuse to do.

His application was made to the district court August 9, 1873. The defendants answered, and for their first defense alleged "that the cause of action on which the plaintiff's application is based, accrued to him against the defendants, more than six years prior to the commencement of this suit, by the said plaintiffs, and so, they say that the said action is barred by the statute of limitations." To this defense the relator demurred. The court overruled this demurrer, and dismissed the case at his costs. For alleged error in this action of the court below, the plaintiff here prosecutes his petition in error.

The code of civil procedure limits the time within which an action can be brought "upon a liability created by statute, other than a forfeiture or penalty," to six years. (Sec. 14.) This provision is found in title 2, of the Code, the object of which is to define and prescribe "the time of commencing civil actions." The civil action of the code is a substitute for all such judicial proceedings as, prior thereto, were known, either as actions at law, or suits in equity. (Sec. 3.) By section 8, the limitations of this title are expressly confined to civil actions. But proceedings in mandamus were never regarded either as an action at law or a suit in equity, and are not therefore a civil action within the meaning of the code. Mandamus is an extraordinary or supplementary remedy, which cannot be resorted to if the party has any other adequate, specific remedy. The code provides for and regulates this remedy, but does not recognize it as a civil action. It declares that the writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of law. (Sec. 570.) And in section 577 it provides that: "No other pleadings or written allegation is allowed than the writ and answer."

These are the pleadings in the case, and have the same effect, and are to be construed and may be amended in the same man-

ner as *pleadings in a civil action*; and the issues thereby joined must be tried and the further proceedings thereon had in the same manner as in a civil action." This language clearly implies that mandamus is not comprehended within the civil action of the code, to which alone the limitations of title 2 are applicable as an absolute bar.

In holding otherwise, we think the court below error, and its judgment must, therefore, be reversed. * * *

Judgment accordingly.

for plain.

STATE v. HOEFFNER.

124 Mo., 488. [1894.]

BURGESS, J.: On the 9th day of February, 1893, there was duly issued from the office of the clerk of the criminal court for the city of St. Louis, a *scire facias* against the defendant, which recited that on the 30th day of April, 1892, the defendant had signed a bond to the state of Missouri in the court of criminal correction in said city as the security of one Lee Qua Lang (who then stood charged in the court of criminal correction with a felony) for his, Lang's appearance in the court of criminal correction, on the 12th day of May, 1892; that default was made in said court on said last named day by said Lang, which was certified to the St. Louis criminal court, and judgment of forfeiture rendered thereon. The writ commanded the defendant to appear on the return day thereof, and show cause why the state of Missouri should not have execution. Defendant filed answer to the *scire facias*, putting in issue all the recitals and allegations therein contained.

On the 2d day of October, 1893, the cause was called for trial in the criminal court, when defendant requested and demanded a trial by jury, which was refused by the court, and he saved his exceptions. The court then proceeded to hear the case and made its finding in favor of the state. From the finding and judgment the defendant appealed. The only point urged upon the attention of this court is the action of the trial court in refusing the defendant a trial by jury.

Section 2131, Rev. St., 1889, reads as follows: "An issue of fact in an action for the recovery of money only, or of specific

real or personal property, must be tried by a jury, unless a jury trial be waived or a reference ordered as hereinafter provided."

Whatever may have been said in other jurisdictions with respect to the nature of a proceeding by *scire facias* on a forfeited recognizance, whether civil or a continuation of the original proceeding, the holding in this state has been, that it is a mere continuation of an original proceeding to enforce the collection of a debt confessed. State v. Randolph, 22 Mo., 474; State v. Heed, 62 Mo., 559. See also Lawton v. State, 5 Tex., 272; 2 Bouvier's Inst., section 3721, chap. 27.

The writ is a common law writ. It is not the commencement of a civil or new action within the meaning of the code, but the writ recites the recognizance and judgment of forfeiture, and requires the parties against whom issued to appear in court, at the next regular term, and show cause, if they can, why final judgment shall not be rendered against them for the amount of the recognizance so forfeited, and execution issued therefor. The practice has been in this state, and many others, to plead the writ, although our code is silent as to the course to be pursued with respect to a *scire facias* issued upon a forfeited recognizance. Every defense which could be made by way of plea or demurrer to a petition may also be made to the writ, and when demurred to the demurrer goes to the entire record. The writ may be amended when necessary, as pleadings in civil cases, the only difference being that where a demurrer is filed to any pleading in an ordinary civil action, it only goes to the face of such pleading, while in the case of a demurrer to a *scire facias*, issued upon a forfeited recognizance, it goes to the whole record. State v. Randolph, State v. Reed, *supra*.

This is not a civil action within the meaning of the code for the recovery of money. Instead of a summons being issued requiring the defendant to appear and answer a petition, as in a civil action, a *scire facias* issued to the defendant requiring him to show cause why a judgment already confessed, interlocutory in its effect, should not be made final, and execution issued thereon, the causes generally shown being *nul tiel* record, release or accord and satisfaction, no one of which, nor all of them, convert the proceedings into an action which is said to be "a legal prosecution in an appropriate court by a party complainant against a party defendant to obtain the judgment of that court in relation to some rights claimed to be secured or

some remedy claimed to be given by law to the party complaining." 1 Am. and En. Encyclopedia of Law, 178; 1 Wait's Actions and Defenses, 10. It is only in such cases that the parties are entitled to a trial by a jury in civil actions, unless the right is given by statute as in the case of inquiry of damages upon the dissolution of an injunction bond, and cases of like character. If the proceeding had been by suit brought upon the recognizance bond, as is the practice in some of the states, then the rule would be different, and the case triable by jury.

We have not overlooked the case of Milsap v. Wildman, 5 Mo., 425, in which it is held that a *scire facias* is an action, also a suit; and Wolf v. Shaefer, 4 Mo. Ap., 367, in which the same rule is announced, and in which it is further held that such cases are triable by jury unless the same be waived. To the same effect is State v. Posey, 79 Ala., 45.

The Milsap case was a proceeding by a *scire facias* to revive a judgment in a civil suit, and the Wolf case was a proceeding by *scire facias* in the probate court under the statute against the administrator upon his bond, and are not, therefore, controlling authority in this case. In a criminal case a proceeding on a forfeited recognizance by *scire facias* is, as has been said, but the continuation of a proceeding already commenced, while in a civil case it is more like an original action.

In Humphries v. Lundy, 37 Mo., 320, which was a proceeding to revive a judgment rendered by a justice of the peace, Holmes, J., in speaking for the court, says: "A clear distinction is made in the books between an action and a *scire facias*, Mr. Chitty treating of debt on judgments, speaks of the "remedy by *scire facias*," as also frequently adopted, on which damages are not recoverable for detaining a debt, and therefore he considers it more judicious to proceed by action upon a recognizance of bail than by *scire facias*, which is "only a continuance of a former suit, and not an original proceeding." 1 Chitty on Pleading, 127, 299; McGill v. Perrigo, 9 Johns., 259; Brown v. Harley, 2 Fla., 159; Ellis v. Jones, 51 Mo., 187. We think the rule thus announced in harmony with our code and the understanding of the profession generally.

From what has been said, it necessarily follows that section 28, article 2, state constitution, which provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate," has no application to this case. State ex rel v. Vail, 53 Mo., 97. The judgment is affirmed. All of this division concur.

*Distinction
bet. civil
proceeding
by scire facias
and
civil
action - the
was more
common*

*Trial by
jury not
necessary
in case of
proceeding
on "scire
facias"*

STATE EX REL. v. JENNINGS.

56 Wis., 120. [1882.]

Appeal for Circuit Court, Waupaca County.

This case was commenced in 1877. It was here on a former appeal from an order overruling a demurrer to the relation and a motion to quash the alternative writ of mandamus. 48 Wis., 549. The defendants thereafter having made return to the writ, the relator moved to strike out certain designated portions of the same. The circuit court granted the motion as to certain portions of the return, and denied it as to certain other portions. The defendants appeal from the portion of the order striking out certain portions of the return, and the relator appeals from that portion of the order refusing to strike out another certain portion of the return, and both appeals were argued together.

CASSODAY, J.: Are the rules as to practice and pleadings in ordinary actions applicable in cases of mandamus? The provisions of the present statute entitled "Proceedings in Civil Actions in Courts of Record," relate not only to "actions," but also to "proceedings in the circuit courts." Section 2593. Section 2600, Rev. St., provides that "the distinctions between actions at law and suits in equity and the forms of all such actions and suits have been abolished and there is in this state but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which is denominated a civil action." Id., section 8, c. 122, Rev. St. of 1858. That title also includes c. 121, Rev. St., which prescribes "the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings are determined," (section 2644, Rev. St.) and gives the only requisites of the only pleadings provided for, to-wit, a complaint, answer, reply and demurrer. The statutes also provide, in effect, that whenever any writ of mandamus shall be issued, the person, body, or tribunal to whom the same shall be directed and delivered shall make return, and for a neglect so to do shall be proceeded against as for a contempt. Sec. 3450 Rev. St. And whenever a return shall be made to any such writ, the person prosecuting the same may demur or answer all or any of the material facts contained in the same return; and the like proceedings shall be had thereon, for the determination thereof, as might have been had if the person prosecuting such writ had

brought his action for a false return. Section 345, Rev. St. But notwithstanding the provisions of the statute referred to, it was contended by the learned counsel for the relator that proceedings by mandamus are not affected by the Code, but are regulated by the rules of pleading and practice prevailing at common law, and he cites in support of his position, *People v. Ulster Co.*, 32 Barb., 477.

In that case the defendants demurred to the reply on plea of the relator to a portion of the return, and the court directed judgment for the defendants on the demurrer, with leave of the plaintiff to amend this plea on payment of the costs. That decision was reversed, however, in the court of appeals (34 N. Y., 268) on the ground that the particular paragraph of the answer to which the plea or reply was made, was immaterial, impertinent and frivolous. Page 269.

In *People v. Baker*, 35 Barb., 105, it was held that "the return must be good, tested by the ordinary rules of pleading, both in form and substance, and stands as the second pleading in the case." Some of the New York cases have regarded proceedings by mandamus as an action for the purpose of taxing costs. *People v. Colborne*, 20 How. Prac., 378; *People v. Lumley*, 28 How. Prac., 172; S. C. id. 470.

In the last case cited it was said at general term by MASON, J., giving the opinion of the court, that, "if any question can be regarded as settled with us in this district, it is that a proceeding upon mandamus, where there has been a return, and the suit has gone to pleadings, and a trial thereon has been had, is not a special proceeding under the code, but an action." 28 How. Prac., 172. And on appeal from the order the court of appeals, per DAVIS, J., said: "It is not an order which in effect determines the action and prevents a judgment from which an appeal might be taken to this court. It is not a final order made in a special proceeding, for this is an action." 28 How. Prac., 471.

The other authorities from New York cited by the counsel for the relators are to the effect that immaterial matter stated in the return may be stricken out on motion or "rejected as surplusage." But the New York cases are not altogether applicable, for the proceedings there are governed by the statutes and Code of that state. Sec. 471 of their Code, among other things, provides, in effect, that the second part of that act, being the part

entitled "Of Civil Actions," "shall not affect proceedings upon mandamus." The Code, as originally adopted in this state, provided that, "until the legislature shall otherwise provide, this act shall not affect proceedings upon mandamus," etc. Sec. 365, c. 120, Laws 1856. That provision was excluded by the revision of 1858, which, among other things, provided that "all the forms of pleading heretofore existing are abolished, and hereafter the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings are determined, are those prescribed by this chapter" (section 1, c. 125, Rev. St. 1858), which consisted of a complaint, answer, reply, and demurrer, as now. The legislature having thus excluded the saving clause as to mandamus, and abolished all "existing forms of pleading," and all "distinctions between actions at law and suits in equity, and the forms of all such actions and suits," can it still be maintained that the rules of pleading and practice in mandamus cases are not to be governed by the statute as to the sufficiency of the pleading, but by the rules which existed at common law. It is true that at common law the word "civil actions" would not include writs of mandamus. Com. v. Com'rs of Lancaster, 6 Bin., 9. Mr. Bouvier says: "The vital idea of action is the proceeding on the part of one person, as actor, against another for the infringement of some right of the first, before a court of justice, in the manner prescribed by the court or the law." On the other hand, a mandamus at the common law of England was denominated a prerogative writ, and was originally issued out of the court of chancery, but subsequently out of the court of King's Bench, because the king originally sat in these courts in person, and aided in the administration of justice. Hence, in theory at least, it was not so much the individual seeking redress as the king who was the actor.

In this country it cannot be a prerogative writ; but, nevertheless, partakes of the nature of such a writ, and under the constitution and laws is issued by the courts. Att'y Gen. v. R. R. Co. *te seq.*, 35 Wis., 512. Beyond question it is, however, in a proper case, in substance a civil remedy for the citizen who has been deprived of a clear legal right, notwithstanding it is commenced and prosecuted in the name of the state. The state is only a nominal party. Bowes v. O'Brien, 2 Carter, 431; State v. Commissioners, 5 O. St., 502. The word "suit" is frequent-

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ly used in practice as synonymous with the words "civil action," but, nevertheless, it seems to be more comprehensive and includes proceedings in chancery as well as law. *Didier v. Davidson*, 10 Paige, 516. The word "suit" was held to include the writ of prohibition in *Weston v. City of Charleston*, 2 Pet., 449. Chief Justice Marshall, speaking for the court there, said: "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law gives him." Page 464. One definition of the word "suit," as given by Bouvier, is: "A petition to a king or a great person, or a court." Other dictionaries give similar definitions. In Vermont it has been held to include a petition by a creditor of a deceased estate to liquidate and recover his demands. *Colderwood v. Colderwood*, 38 Vt., 176. So proceedings to condemn lands for a public use have been held to be a suit within the meaning of the judiciary act. *U. S. v. Block*, 121; 3 Biss, 208; *Warren v. Wis. Valley R. R. Co.*, 6 Biss., 425. In Georgia it has been held to include a petition for a writ of certiorari. *Kendrix v. Kellogg*, 82 Ga., 435. So it has been held to include a proceeding by mandamus. *McBane v. People*, 50 Ill., 506-7; *Felts v. Mayor*, 2 Head., 650.

Our statute on the subject of pleading speaks not only of the "actions at law and the suits in equity," but also "of the forms of all such actions and suits." Believing that our statute respecting pleading and practice should have a liberal construction, we are constrained to hold that a proceeding by mandamus is essentially a suit, and that when issue is joined by the return it becomes, in effect, a civil action within the meaning of the statute, and as to the form and the sufficiency of the several pleadings, must be governed by the same rules which prevail in other civil actions. Of course, the relation is to be regarded the same as a complaint, and the return as the answer to which the demurrer or reply may be interposed. This is in harmony with the repeated adjudications of the court. Applying the ordinary rules of pleading and practice in the case before us, and we must hold that that portion of the order refusing to strike out a portion of the return is not appealable, for the reasons given in Kewaunee v. Decker, 28 Wis., 669; Noonan v. Orton, 30 Wis., 609. * * *

For the reasons given, the appeal taken by the relator is

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dismissed and those portions of the order striking out portions of the return are reversed, and the cause is remanded for the further proceedings according to law.

*Judgment reversed.**

DEER LODGE COUNTY v. KOHRS.

2 Mont., 66. [1874.]

Kohrs was the administrator of the estate of Frederickson, deceased. The Board of County Commissioners of Deer Lodge County commenced this action in behalf of the county, which was a creditor of the estate. The probate court rendered judgment in favor of Kohrs, Jan. 25, 1873. An appeal was then taken to the district court and dismissed by the court, Knowles, J., upon the motion of Kohrs.

WADE, C. J.: The only question involved in this case relates to the jurisdiction of the probate court. This action was commenced in the probate court of Deer Lodge county, and from thence appealed to the district court, wherein it was decided that the probate court had no jurisdiction of the case and from this decision appeal was taken to this court.

The complaint charges that the administrator committed waste in this, that he converted to his own use about \$1,800 of the property of the estate, and failed to account for the same to the estate or to the creditors thereof, of whom this plaintiff is one, and asks a judgment against the administrator for double the amount of the property thus wasted, in pursuance of a provision of the statute.

It is claimed that this proceeding is a civil action, and that by virtue of Section 2 of the statute amendments to the Organic Act, wherein it is provided that the probate courts, in addition to their probate jurisdiction, shall have authority to hear and determine civil causes, wherein the debt or the demand claimed does not exceed \$500, necessarily excludes the probate court's jurisdiction to hear the matters herein involved, for the reason that more than \$500 is in dispute.

To decide this case properly it will be necessary to decide

*In many of the States the Practice Act does not embrace the extraordinary writs. See *State ex rel. v. Williams*, 96 Mo., 13.

what is meant by the term "probate jurisdiction," as used in the Organic Act."

The Organic Act provides (section 9) that the jurisdiction of the probate courts shall be limited by law.

This section, therefore, confers upon the legislature authority to define the probate jurisdiction of this court, and, in pursuance of this authority, the legislature has bestowed upon such courts jurisdiction as follows:

Civ. Prac. Act. § 626. "There shall be in each county a probate court, within the jurisdiction conferred by this chapter."

The jurisdiction conferred by the chapter, so far as it affects this case, is as follows:

Civ. Prac. Act, § 627. "The probate court shall have power to open and receive the proofs of last wills and testaments, and to admit them to probate; to grant letters testamentary of administration and of guardianship, and to revoke the same for cause shown, according to law; to compel executors and administrators and guardians to render an account when required, or at the period by law designated; to order the sale of the property of estates, or belonging to minors; to order the payment of debts due by estates; to order and regulate the partitions of property or estates of deceased persons; to compel the attendance of witnesses; to appoint appraisers or arbitrators; to compel the production of title deeds, papers or other property of an estate or of a minor, and to make such other orders as may be necessary and proper, in the exercise of the jurisdiction conferred on the probate court."

Here is the jurisdiction of the probate courts, as it relates to the settlement of estates, and it will be observed that, although the court can make all the necessary orders in the premises, it cannot render judgments.

By virtue of this section, the probate court is clothed with authority to appoint administrators, and, therefore, to place in their hands the property belonging to estates, and to compel a settlement and the distribution of the property. And by appropriate legislation, and in order to carry out and to exercise the jurisdiction conferred by the foregoing section, the probate court has the authority to cause the administrator to file an inventory of the estate; to cite such administrator to render an account at any time; to hear exceptions to his accounts; to hear

charges against him or other persons for embezzling the property of the estates, and also to hear charges as to the commission of waste by such administrator. All these powers and this authority necessarily grow out of the jurisdiction conferred by section 627, and are purely of probate jurisdiction, and are not affected by the \$500 limitation, contained in section 2 to the amendment to Organic Act, because they are not civil actions. All this authority is necessary to properly preserve and administer an estate. But it was not contemplated by the legislature that judgments could be rendered against an administrator in any of these cases, for the probate court, when exercising its probate jurisdiction as conferred by section 627, makes orders but does not render judgments. And so it is, if the accounts of an administrator show a deficiency, the court can order the amount due from the administrator to be paid to the persons legally entitled to receive the same, and if the order is not obeyed, the only remedy is to bring a civil action in a court of competent jurisdiction for a judgment. And so upon an order for distribution the probate court can enforce the order, but if the distributive share is not paid as ordered, the order and proceedings of the probate court lay the foundation for a civil action, where judgment and execution can be had. Therefore it is that an action to compel an account to be rendered, to hear exception to accounts, for embezzling the assets, for waste against an administrator, or for the distribution of an estate, are not civil actions, but proceedings, and come within the direct line of probate jurisdiction.

The case before us was for waste, that is, the administrator was charged with receiving about \$1,800 belonging to the estate and failing to account for the same. There is no doubt but that the probate court had authority to inquire, in a summary manner, as to the facts charged, and to make an order thereon, but not to render a judgment, because the mode of trial is not such as would support and make valid any judgment that might be rendered. That this is the meaning of the statute is evident. Section 274 of the act concerning administrators and executors, provides: "Upon such application (an application charging the administrator with waste) the court shall direct an issue to be made up, whether there be waste or not, which shall be tried as demands against the estate."

How are demands against the estate to be tried? The same

act, section 201, answers this question: "The probate court shall hear and determine all demands in a summary way without the form of pleading, and shall take the evidence of competent witnesses, or other legal evidence."

Then, if the administrator is charged with the commission of waste, the matter is to be tried as demands against the estate are to be tried, that is in a summary way, and without the form of pleading. The statute, both as to demands against the estate and as to waste, provides for the rendition of a judgment. But can a judgment be rendered in this summary way without a legal formal trial? Can a judgment be rendered without pleadings, and without the legal formation of an issue? What would such a trial determine, and could it be plead in bar? A bar to what. There is nothing to show upon what the judgment was founded, and nothing by which any one could be informed as to what was tried and determined by the judgment. The whole proceeding would show simply a judgment, rendered upon an undefined issue, without pleadings, and as to what was tried, or what was left untried, no one could guess, much less legally determine. Such a judgment rendered in this summary manner would not bar a civil action, in a court of competent jurisdiction upon the same subject matter, so that the rendition of such a judgment, by the probate court, would amount simply to an order and that is what was contemplated by sec. 627, wherein jurisdiction is conferred.

2. What is a civil action? It is an action wherein an issue is presented for trial formed by the averments of the complaint, and the denials of the answer, or the replication to new matter, and the trial takes place by the introduction of legal evidence to support the allegations of the pleadings, and a judgment in such an action is conclusive upon the rights of the parties, and could be plead in bar. But an action, the issues of which are made up in a summary way, without pleadings, without a formal issue, without any definite means of knowing what is to be tried, an undefined oral arrangement, a sort of inquisition, where charges are made in the dark, and where parties can have depositions taken at his own expense, but not otherwise, as provided in section 202, even if testimony should be thought necessary in such a trial, cannot be dignified by the name of a "civil action," and it hardly reaches the dignity of a "proceeding."

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We therefore conclude that proceedings to establish demands against an estate, or to charge an administrator with waste are not civil actions within the meaning of the Organic Act, and are unaffected by the \$500 limitation contained in the amended act. * * *

*Judgment affirmed.**

*Affirmed on the ground that the Statute did not provide for an appeal in such cases.

CHAPTER II.

PARTIES TO ACTIONS.

Section 1. The Real Party in Interest.

“The general rule is, that the action should be brought in the name of the party whose legal right has been affected, against the party who committed the injury, or by or against his personal representative; and therefore a correct knowledge of legal rights, and of wrongs remediable at law, will, in general, direct by and against whom the action should be brought.”
—*Chitty's Pleadings*, 5 Am. Ed. 1.

CODE PROVISIONS:

“Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A person, with whom or in whose name, a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section.”
—*N. Y. Code Civ. Proc.* § 419.

“Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract.”—*R. S. 1899 (Mo.)*, § 540

An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.—*R. S. 1899 (Mo.)*, § 541.

X RICHARDSON v. MEANS.

22 Mo., 495. [1856.]

This was an action commenced June 17, 1853, by Maria L. Richardson (the husband having afterwards been made a party by an amended petition) for the recovery of a female slave and her two children, alleged in the petition to have been wrongfully taken by the defendant, May 1, 1849, and unlawfully detained by him.

Defendant, in his answer, denied the title of the plaintiff, and claimed title in himself, and relied upon a bill of sale to himself, dated May 1, 1848, of the negress and one child, executed by Thomas R. Richardson, husband of plaintiff, Maria, and co-plaintiff in this action.

To sustain the wife's right, she relied on a deed of gift from her father, William C. Bruce, dated April 1, 1845, by which, in consideration of love and affection toward the plaintiff, his daughter, he conveyed the female slave in controversy to one Littleton Jozner, "upon trust, that the said Jozner, his executors, etc., shall permit my said daughter to hold possession of and take the use, hire and profits of the said Maria and her increase to her sole and separate use during her life, independent of her said husband; and at the death of my said daughter, the said Maria and her increase to be equally divided between her children, etc." * * *

The jury found for the defendant, and judgment was given accordingly. Plaintiffs appealed.

LEONARD, J., delivered the opinion of the court.

We cannot reverse this judgment, no matter how much we may regret that parties, by a slip in the form of proceedings, should subject themselves to costs and delay in the judicial enforcement of their rights. The instructions given are correct in point of law, and this seems to be admitted; but the objection is, that the one given by the court upon its own suggestion was not warranted by an evidence in the cause, and that, although correct in the abstract, it had the effect of misleading the jury. If this could be made apparent to us, it might furnish sufficient ground for reversing the judgment in a case where the reversal would avail the party. Here, however, the plaintiffs have stated themselves out of court, and, therefore, if the jury were misled, it resulted in no injury to them; for the reason that, ac-

cording to their own showing, they had no case entitling them to recovery. The plaintiff's title is derived from the instrument of gift executed by the father, which vests the legal ownership in the trustee for the use of the wife during her life, and upon her death for the use of her children, and the action is to redress a wrong done to the legal ownership, being substantially an action for the conversion of the plaintiff's slaves. Under the old form of proceeding, this suit must have been brought by the trustee at law; but if, from any cause, the legal ownership could not have been made effectual for the protection of the wife's equitable right, the courts would, at her suit, upon a proper statement of facts, all the necessary parties being before them, have administered the appropriate equitable relief. But it is supposed that all this is changed by the new code, which is true to some extent. It must be observed, however, that the code has not changed the rights of parties, but only provided new remedies for their enforcement; it has not abolished the distinction between equitable and legal rights,* but the distinction between legal and equitable remedies, so far at least as to provide that one form of suit shall be used for the enforcement of both classes of rights. The case made upon the record was for legal relief; but the case made by the plaintiffs, in proof, was of a different character.

It was the duty of the trustees to protect the legal ownership from violation, and to preserve the property for the use of the parties beneficially interested as they should respectively become entitled; and if, as before remarked, there were any obstacles in the way of the legal remedy, or the trustee refused to do his duty, then, upon a proper case stated, and the proper parties being made, the courts would, in a civil suit under the code, afford relief according to the principles of equity; and the present judgment cannot be pleaded in bar of any equitable relief that shall be thus sought by the wife.

The judgment must be affirmed.

for del.

* A true equitable right exists when a legal right is held by its owner for the benefit of another person, either wholly or in part. Such a right may be defined as an equitable personal obligation. It is an obligation because it is not ownership. That is, it is not ownership of the thing which is the subject of the obligation. For example, when land is held by one person for the benefit of another, the latter is not properly owner of the land even in equity. Of course the equitable obligation itself is as much the subject of ownership as is a legal obligation; and the only reason why such ownership is not recognized by the courts of common law is that the thing itself which is the subject of the ownership (i. e., the equitable obligation), is not recognized by them.—Langdell, *Brief Survey Equity Jurisdiction*, p. 1.

Wife, being a cestui que trust, was not the proper party to bring a legal action

PECK v. NEWTON.

46 Barbour, 173. [N. Y. Sup. 1863.]

By the court, PARKER, J.: This is an action to recover the possession of land. The plaintiff rests the right of the school district (which he represents) to the land in question, upon an alleged exchange made by the district with Jahiel Parsons, in 1834. The district was, at that time, in possession of a school-house and lot, on the south side of the street, holding under one Parsons by some sort of contract. It became desirable to remove the school-house from that site. Parsons owned the land on the opposite side of the street, and, at a special meeting of the inhabitants of the district, Parsons agreed, verbally, with the district, to exchange with them, and give them a site on the north side of the street for their site on the south side. In pursuance of this agreement he staked out a piece of land, including the piece in question, on the north side. The school-house was, the same year, moved across the street to it, and the contract for the site on the south side, which the district held from Parsons, was given up to him, and he sold the site to an adjacent owner. No deed was given by him to the district for the site on the north side, though he agreed to give one. The land staked out measured nearly a quarter of an acre. The school-house was built upon one corner of it, and the lot was never fenced out by the district. Some twelve or fifteen years before the trial (being ten to thirteen years after the exchange), the defendant, who occupied the Parsons farm, fenced in all of the site so staked out, except the part on which the school-house stands and a small piece in front and rear, and has since occupied it for farming purposes. It is this piece, so fenced by the defendant, that is the subject of the controversy between the parties.

The plaintiff has, as it will be seen, at most a mere equitable title to the piece of land, the possession of which he now seeks to recover. Can he maintain this action on such title? It is observed that this is what, before the Code, was called an action in ejectment. No equitable interest in the premises is set up in the complaint, and no equitable relief is demanded, the plaintiff alleging therein that the district has lawful title as the owner in fee simple, so that the possession is not sought as incidental to a specific performance, or other equitable relief, but the plaintiff

counts upon his title, and demands judgment for the possession of the premises.

Now, although the code has abolished the distinction between actions at law and suits in equity, so far as it regards the forms of procedure, still the principles by which the rights of the parties are to be determined remain unchanged. "The code has given no new cause of action. If under the former system a given state of facts would have entitled a party to a decree in equity in his favor, the same state of facts now, in an action prosecuted in the manner prescribed by the code, will entitle him to a judgment to the same effect. If the facts are such as that, at the common law, the party would have been entitled to judgment, he will, by proceeding as the code requires, obtain the same judgment." (Cole v. Reynolds, 18 N. Y. Rep., 76.) As this case stands, the defendant is a stranger to the transaction between the district and Parsons. He offered to prove himself a grantee of Parsons, but the evidence was objected to by the plaintiffs and excluded. There is no privity, then, between the defendant and Parsons.

Even if Parsons himself were defendant, or any person in privity with him, the equitable rights of the parties could not be determined in this action upon the issues here presented. Under proper pleadings, undoubtedly, the absolute rights of the parties in that case, whether legal or equitable, or both, could be determined in one action. But this action being against a stranger in possession, by the plaintiff, resting not a legal but a mere equitable title, I am unable to see on what principle he is entitled to recover. The defendant is not the party who is bound to convey to the plaintiff; so that the proper parties to litigate the question of the plaintiff's equitable title are not before the court. As between other parties, the rule, I apprehend, is, as it has always been in this action, that the plaintiff can recover only on his legal title. (Doe v. Staple, 2 T. R., 684; Doe v. Wroth, 5 East, 132; Jackson v. Pierce, 2 John. 221; Jackson v. Chase, Id. 84; Moore v. Spellman, 5 Denio, 225.)

Before the code, what would have been the relative rights of these parties? Clearly no action at law could have been maintained by the plaintiff against the defendant. Neither can I see any ground in which a suit in equity could have been maintained. The rights of the parties to the alleged exchange must first have been settled by a court of equity, and a specific per-

formance of that contract enforced against Parsons, or those holding the legal title from him, before the plaintiff could have maintained any action against the defendant. Even if this could have been accomplished in a single suit, by making the defendant a party to the suit against Parsons, for the specific performance, still without a decree against Parsons, none could have been had against the defendant. To allow the plaintiff to recover, then, against the defendant, in this action, would be admitting a new cause of action which did not before exist, either at law or in equity.

In regard to what shall constitute a cause of action, the code, as intimated in *Cole v. Reynolds* (*supra*), has made no change. The extent of the change brought in by it, so far as this question is concerned, is, I apprehend, that now, as stated in *Crary v. Goodman* (2 Kern, 268), "the question in an action is, not whether the plaintiff has an equitable or a legal right, but whether, according to the whole law of the land, applicable to the case, the plaintiff makes out the right which he seeks to establish." As already stated, the law of the land never allowed a plaintiff, either at law or in equity, to recover in a case like this. And if before the code he could not have recovered, in any court, upon such a cause of action as he here seeks to establish, he cannot, since the code.

The defendant, after all the evidence was given, moved for a non-suit on the grounds, among others, "that the plaintiff had not proved a cause of action, nor *the* cause of action alleged in the complaint." Also, that the plaintiff's rights, if any, are equitable, and he must sue in equity, and not otherwise. These grounds, I think, sufficiently state the objection above intimated, to the plaintiff's recovery. He had not proved a cause of action entitling him to a recovery against the defendant, and should have sought relief in an equitable action against all the parties obligated to grant him his equitable rights. I think, therefore, the non-suit should have been granted.

There are numerous other objections, made by the defendant's counsel to a recovery; but as this disposes of the case, it is unnecessary to consider them.

I am of the opinion that a new trial should be granted.

Ordered accordingly.

for def.

BAILEY v. WINN.

101 Mo. 649. [1890.]

Ejectment for certain lands in Macon county. On writ of error by defendant to reverse the judgment below in favor of plaintiff.

BLACK, J. 2. The second alleged title of the plaintiff is this: Edward Edwards and his wife, by their mortgage deed, dated January 11, 1871, conveyed the one hundred and twenty acres of land to David W. Williams, to secure a note of the same date, executed by Edwards and payable to Williams for six hundred and seventy dollars, due in two years. David W. Williams acknowledged satisfaction in full on the margin of the record, under date of August 13, 1879. Plaintiff, however, produced in evidence the note with two assignments indorsed thereon, one from Williams to Edward A. Edwards and the other from him to plaintiffs. Edward A. Edwards testified that he had purchased this note from Williams on Aug. 9, 1879, and had it assigned to himself on that day, and that the marginal satisfaction was made without his knowledge or consent, and after he had become the owner of the note. He says he had previously contracted for the note, had made several payments, and that the payment of \$206.20, on Aug. 9, was the last one. Concede that Edward A. Edwards became the owner of the note by assignment, and that he assigned it to plaintiff, still we do not see how the plaintiff can recover in this action of ejectment on the mortgage. There is no doubt but a mortgagee, after condition broken, may recover in ejectment against the mortgagor and those claiming under him. *Sutton v. Mason*, 38 Mo. 120; *Johnson v. Houston*, 47 Mo. 230. The assignment of the debt carries the security, so that the assignee may foreclose the mortgage. But the mortgagee may recover in ejectment, because, after condition broken, he is in law regarded as the owner of the estate. The legal title vests in him for the protection of the debt, but for no other purpose. Before the assignee of the debt can recover in ejectment, he must show a transfer of this legal estate to himself. We have held that the beneficiary in a deed of trust to secure the payment of a debt cannot maintain ejectment, after condition broken. *Siemers v. Shrader*, 88 Mo. 20. So in the case of an ordinary mortgage, the mere assignment of the debt does not vest the title of the

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mortgagee to the land in the assignee. Jones on Mortgages [4th ed.] sec. 818. In the present case, there was no assignment of the mortgage or transfer of the estate by the mortgagee, and it follows from what has been said that plaintiff cannot recover on the mortgage, even if he is the owner and holder of the note.

* * *

The judgment is reversed and the cause remanded. All con-
cur.

for del.

WESTERN R. R. CO. v. NOLAN.

48 N. Y. 513. [1872.]

Appeal from judgment of the General Term of the Supreme Court in the third judicial district, affirming a judgment dismissing plaintiff's complaint.

The action was brought to restrain the defendants, as assessors of the City of Albany, from assessing the sum of \$500,000, for personal property, against Joseph C. Y. Paige and Thomas W. Olcott, trustees, for the purpose of taxation. The said sum was held by Paige and Olcott as trustees, under certain tripartite contracts, dated in 1840, 1841 and 1849, between the City of Albany of the first part, the Albany and West Stockbridge Railroad Company (a corporation of the State of New York), of the second part, and the plaintiff (a corporation of the State of Massachusetts), of the third part. Under these contracts the city of Albany issued its bonds to the plaintiff for \$1,000,000, payable one-fourth in twenty-five years, one-half in thirty years, and the remaining one-fourth in thirty-five years from June, 1840, with interest coupons at six per cent per annum, payable semi-annually; the plaintiff agreeing to apply one-tenth of the proceeds of the bonds to the creation of a sinking fund, to be held, managed and controlled by two trustees, one of whom should be the chamberlain for the time being of the city of Albany, and the other to be nominated by the plaintiff, who was required to keep the fund invested; together with an additional one per centum on the amount of the said bonds, to be contributed annually to the said fund by the plaintiff, and accumulate the said fund for the purpose of retiring the said bonds at maturity, paying the surplus to the said plaintiff. The resi-

due of the proceeds of the said bonds the plaintiff agreed to apply to the construction of the Albany and West Stockbridge railroad, which completed a through line of railroad communication from the eastern terminus of the plaintiff's railroad in Massachusetts to the city of Albany. The city of Albany also agreed to subscribe for \$1,000,000 in the stock of the Albany and West Stockbridge Railroad Company, to be held by said city in consideration of the issue of said city bonds, of which stock the plaintiff was to become the owner as fast as it retired the said bonds; and the agreement appears to contemplate that the plaintiff would become the lessee of the said West Stockbridge railroad, until the plaintiff became the owner of said railroad by payment of the said city bonds; and the plaintiff also agreed to pay the interest on the bonds as it became due, as a rent for the use of the said West Stockbridge railroad. This agreement was carried into effect; the said bonds were issued, and were outstanding at the commencement of the action; and the said sinking fund amounted, with all the annual payments of the plaintiff thereto, and the accumulations thereon to \$916,489.41, of which the said Paige and Oleott were then in possession and the actual trustees. This fund was invested by the trustees in the name of the plaintiff and the city of Albany, on bond and mortgage to the amount of \$322,529, and the residue in the stocks of the State and general government, and in bonds of the city and county of Albany, cash on hand, and bonds of the New York Central Railroad Company. The judge, before whom the action was tried without a jury, found that the defendants were assessors of the city of Albany; that, as such, they had determined that the said fund was liable to taxation, and, in pursuance of their determination, had entered in the assessment roll of the said city the amount of \$500,000, for personal property in the names of Thomas W. Oleott and Joseph C. Y. Paige, trustees as aforesaid. That the plaintiff had no other property in the city and county of Albany, except office furniture of the value of fifty dollars. That the plaintiff had, in due time, presented to the defendants, as assessors, proof of the said facts, and requested them to strike the said assessment from the assessment roll, and that the assessors declined to accede to it, but determined to assess the said fund for the purposes of taxation. That the defendants were not of sufficient pecuniary responsibility to respond to the plaintiff in damages if it should

be determined that the said fund was not liable to taxation. That the plaintiff is a foreign corporation, created under the laws of the State of Massachusetts.

The plaintiff requested the judge to decide that the said fund was not liable to be assessed for the purposes of taxation, and that the plaintiff was entitled to an injunction restraining the defendants, as assessors, from assessing the said fund for taxation, and from assessing the said trustees for the said fund; but the said judge held and decided that the plaintiff was not entitled to the relief demanded, and adjudged that the complaint be dismissed with costs. The plaintiff duly excepted to such refusal to find as requested, and to the decision so made by the said judge.

The defendants thereupon entered judgment, dismissing the complaint, with costs.

LEONARD, C. While the plaintiff has an important interest in the sinking fund, it is not under its control or management, nor is the title to it vested in it. It has such an interest as would enable it to compel an accounting by the trustees, or maintain an action against them for the correction of an abuse of the fund. The plaintiff has agreed to indemnify the city of Albany from injury by losses to the fund, and is thereby indirectly bound to maintain it, or to pay the bonds, amounting to \$1,000,000, with the interest; and the plaintiff is also entitled to the amount of the trust funds remaining, after the said bonds, with the interest, have been satisfied or paid. Perhaps it might maintain an action against third parties for the protection or defence of the fund, in case the trustees should, on request, refuse to institute the proper action or proceedings for that purpose. The plaintiff should be regarded as a cestui qui trust, and interested in the said fund. The trustees are the parties in whom the fund is vested and whose duty it is to maintain and defend it against wrongful attack or injury tending to impair its safety or amount. The title to the fund being in them, neither the cestuis qui trust nor the beneficiaries can maintain an action in relation to it, as against third parties, except in case the trustees refuse to perform their duty in that respect, and then the trustees should be brought before the court as parties defendant. There is nothing in the case proving any refusal or reluctance on the part of the trustees to perform any duty which they ought to assume in vindicating the fund from

illegal assessment or taxation. The plaintiff has not, for these reasons, made any case entitling it to bring this action.

There are other technical objections to this action which are insurmountable. * * * * *

Judgment affirmed.

for def.

WHEELER v. ALLEN.

51 N. Y. 37. [1872.]

EARL, C. The plaintiff in this action of replevin claimed to receive scrip of the Great Western Insurance Company to the amount of \$1,310, which was issued in the year 1864, and scrip in the same company for \$3,570, issued in the year 1865, and he recovered upon the trial for both scrips.

There are two grounds upon which I hold this recovery was erroneous.

1. As to the scrip of 1865, it seems undisputed that the defendant never purchased any for the plaintiff. He was directed to take the plaintiff's money, which was in his hands, and invest it in the scrip of that year. But he did not do so, but used the money for other purposes. It is true, however, that he gave plaintiff a certificate June 2, 1865, stating that he had invested this money in such scrip, but this certificate was untrue. While it may be true that an action of replevin may be maintained to recover property which the defendant has had in his possession but was wrongfully disposed of, I know of no authority or principle which will authorize a recovery in such an action for property of which the defendant never has had the possession.

Here def. has never purchased the stock, but had converted the money with which he was to do

2. It seems to be undisputed that the scrip for the \$1,310, was issued to the defendant and stood in his name. Hence, he had the legal title to the same. In law he held the same as trustee for the plaintiff, and as such trustee he could be compelled to account to the plaintiff in an action of equity. But an action of replevin to recover the scrip under such circumstances is a great novelty. The legal title was never vested in the plaintiff, and his only remedy to procure this scrip was by an action in equity.

Def. had purchased above in his name with plaintiff's money; he held as trustee and plaintiff had only equitable title; he could sue for the thing itself

The order of the general term should be affirmed and judgment absolute rendered against the plaintiff for costs.

Order affirmed, and judgment accordingly.

for def.

KINGSLAND v. CHRISMAN.

28 Mo. App. 308. [1887.]

This is an action in replevin for the recovery of the possession of certain personal property. The facts are as follows: On the fourth day of May, 1884, one W. C. Everett sold to one Stephen Gaucher the property in controversy, for which Gaucher executed to Everett his promissory note. To secure this note, Gaucher executed, on the same day, a chattel mortgage on the property to Everett. Before the maturity of the note, Everett assigned the same, by writing his name on the back thereof and delivering it to one Sheldon, for a valuable consideration; and, thereafter, and before the maturity of the note, said Sheldon, in the same manner, assigned the note to plaintiff, for a valuable consideration. By the terms of the mortgage, the mortgagor was to retain the possession of the mortgaged property until default in paying the note. After the maturity of the note, the debt being unpaid, the defendants were in the possession of the property mortgaged. How they acquired this possession does not appear. In their answer they pleaded ownership. At the trial the plaintiff, after proof of the foregoing facts, rested. Thereupon the defendants demurred to the evidence. The court sustained the demurrer and plaintiff has appealed.

PHILLIPS, P. J. This case presents the single question, can the assignee of a debt, secured by chattel mortgage, without an assignment of the mortgage itself, maintain, in his own name, the action of replevin for the recovery of the possession of the mortgaged property? The court below held that he could not.

At first impression this question seems easily answered. But in the absence of any direct adjudication by our supreme court, I find it, on examination of the authorities, by no means free from embarrassment. There is no question of the general proposition, that the assignment of the note carried the mortgage with it. The debt is the principal thing; the mortgage, which is but the security, is the mere incident of the debt; and on the maxim, omne principale, trahet ad se accessorium, where the debt goes the mortgage follows. But the courts say that this following of the mortgage after the debt, where only the debt is formally assigned, is but an equitable assignment as to the mortgage, and not a legal transfer. Thus Richardson, J., in An-

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derson v. Baumgartner (27 Mo. 86), said: "The doctrine is well settled that the transfer of a deed [debt?] carries with it *in equity* the mortgage as a security." In Tisen v. People's Ass'n (57 Ala. 331), Brickell, C. J., said: "An assignment of the debt would in equity pass the mortgage." And likewise, Wilde, J., in Crain v. Pain (4 Cush. 485), treats the transfer of the mortgage as an incident of the debt, as an equitable transfer. Accordingly, Jones in his work on Chattel Mortgages, section 503, asserts the doctrine to be that: "The mortgagee's legal interest does not pass by his assignment of the debt. Such assignee cannot maintain replevin in his own name for the mortgaged property; though he may in the absence of any express or implied stipulation to the contrary, bring such actions in the name of the mortgagor, who holds, in such case, the legal title in trust for such assignee's benefit." In support of the text, the case of Ransdall v. Tewksbury (73 Me. 197) is cited. The case fully sustains the proposition. The argument is, that the interest of the mortgagee in the property vests solely by virtue of the mortgage, which represents the property. Had no mortgage been taken he would have had no property, title or interest whatever in the property. The note in nowise had any effect upon the title to the property. The whole office of the note being limited to the payment of the consideration for the property sold by the mortgagee to the mortgagor, the assignment of the note could not affect the title to the property it was given to pay for. The assignment of the debt gave to the assignee an equitable interest, at least, in the mortgage, the mortgagee holding it in trust for the benefit of the holder of the debt. Such equitable interests are protected by the courts of law, and may be enforced in the name of the party holding the legal, as distinguished from the equitable, title. This seems to be the holding in Massachusetts and Alabama. Crain v. Pain, *supra*; Prout v. Root, 116 Mass. 410; Graham v. Rogers, 21 Ala. 498; see also Harman v. Barhytt, 31 N. W. Rep. 488, and note.

Most of the cases, which I have been able to find, where the assignee was allowed to maintain the action in his own name, is where the mortgage itself was assigned in writing. In such case the assignee, without question, holds the legal title. In Langdon v. Buel (9 Wend. 80), the action was trespass *de bonis asportatis*, brought in the name of Langdon, who was the mortgagee, but who had previously transferred the note, secured by

the mortgage, to one Pitcher. Speneer, C. J., said: "A mortgagee of personal property, upon the failure of the mortgagor to perform the condition of the mortgage, acquires an absolute title to the chattel. The notes which this mortgage was given to secure appear to have been assigned or transferred to one Pitcher. When they were so transferred does not appear. * * * Did not the mortgage pass with the notes as incident to them, and should not the action have been brought in the name of Pitcher instead of Langdon? I do not perceive how such conclusion is to be resisted. A mortgage of real or personal estate is but an accessory or incident to the debt, or the security which is given as the evidence of the debt. The assignment of the security passes the interest in the mortgage. The mortgage can not exist as an independent debt. If, by special agreement, it does not accompany the security assigned, it is, *ipso facto*, extinguished, and ceases to be a subsisting demand. If the notes were endorsed or assigned to Pitcher before they became due and before the mortgage was forfeited, the inchoate interest of the mortgagee must have passed with them. If the transfer of the notes was after they fell due and subsequent to the forfeiture of the mortgage, then the assignment operated as a transfer of the interest of the mortgagee, Langdon, whatever it might have been, in the mortgaged chattel; and in either aspect the action of trespass should have been brought in the name of Pitcher."

In *Woodruff v. King* (47 Wis. 261), the action was replevin by an assignee of the debt; and his right to maintain the action passed unchallenged by counsel and court, with the observation, that the note being negotiable, and in the hands of the plaintiff, was presumptive evidence of ownership; "and the transfer of the note carried with it the mortgage security," citing *Rice v. Cribb* (12 Wis. 182), in which it is said: "The transfer of the notes carries with them the interest in the mortgage."

In *Crow, McCreery & Co. v. Vance* (4 Ia. 440-441), the court say: "It is the settled doctrine in equity, that the assignment of a promissory note, secured by a mortgage, carries the mortgage with it; and the assignee may maintain an action upon it in his own name, to enforce the lien. Mortgages are not considered as conveyances of land, within the statute of frauds. The right of the mortgagee is a mere chattel interest inseparable from the debt it is intended to secure, and transferable by

a mere assignment of the debt, without deed or writing. The debt is the principal thing. The right of the mortgagee in the land is an incident of the debt, and ceasing when the debt is discharged. This doctrine rests upon the well established principles of courts of equity, which, under circumstances closely analogous, entitle a surety, who pays the debt, to every remedy which the creditor has against the principal debtor to enforce every security and all means of payment. By the assignment of the debt, the assignee is entitled to use all the remedies the assignor might have used, to enforce the lien of the mortgage against the debtor." See, also, *Furbank v. Goodman*, 5 N. H. 450.

It seems to stand to reason that, as the debt and the security are inseparable, so they cannot reside at the same time in different parties, and he who controls the debt also controls the mortgage, the assignee of the debt should acquire the same rights and have the same remedies, both as to the debt and the security, which the mortgagee,—his assignor,—had at the time of the transfer, or the maturity of the debt had he then held it. It is the well settled law that the mortgagee, after the maturity of the debt, has three independent remedies open to him, which he may pursue successively. ① He may reduce his debt to judgment against the mortgagor, or ② foreclose the mortgage and sell the property, or ③ bring an action for the recovery of the possession. That the assignee of the debt may pursue in his own name the first two remedies, no court questions. Why, then, make a distinction as against the third remedy, and as to that break the unity as to right and remedy? The only answer made is, that the mortgage is only equitably assigned. The same objection, it occurs to me, might with the same force be alleged against the foreclosure proceedings in the name of the assignee. It is conceded in *Ramsdell v. Tewksbury* (*supra*), that such equitable interest may be enforced in a possessory action in the name of the assignor—the mortgagee—to the use of the assignee. Our practice act (sec. 3465) provides that, "every action shall be prosecuted in the name of the real party in interest," allowing to administrators, executors, and trustees of express trusts, the right of action in their names. I am unadvised as to whether a corresponding provision exists in the statutes of Maine, and those states maintaining the doctrine in *Ramsdell v. Tewksbury*. But I understand that one of the very objects in the enactment

of this provision of the code was to obviate the useless form of employing the name of an assignor in an action, who had no real interest in the subject-matter of litigation, and who, when the judgment was obtained in his name, would hold the same in trust for the benefit of the real party in interest.

In *City of St. Louis to use v. Rudolph* (36 Mo. 465), the plaintiff sued as assignee of certain tax bills issued by the city to Ursula Buol. The court said: "Her assignment of the bill may be regarded as an assignment of the cause of action, and it vested in him the whole equitable interest in the demand. He thus became the real party in interest."

In *Edgell v. Tucker* (40 Mo. 531), the court again seem to recognize the principle that, where there is an equitable assignment of the thing, the beneficiary may maintain the action, quoting from *Tindall, C. J., in Crowfort v. Gurney* (9 Bing. 372),—"These circumstances amount to an equitable assignment of the debt due from Gurney to Streather, for Solly might have gone into a court of equity to compel a formal assignment, and no answer could have been given to such an application."

Certainly, where a court of equity would compel the depositary of the naked legal title to assign the instrument to the assignee, under our code, he must be the real party in interest. And it does seem to me that the spirit and object of the statute will be best expressed and executed in allowing this plaintiff to proceed in his own name, immediately, to enforce his possessory right under the mortgage, rather than to compel him either to resort to the circumlocution of a bill in equity to compel an assignment of the legal title, or to bring replevin in the name of the mortgagee.

The cases to which counsel for respondents refer in his brief are mainly instances of deeds of trust on real estate made to a trustee. In such case the legal title is vested in the trustee, mutually selected by the parties as such depositary, to hold in trust for both parties. His is a naked power, not transferable, and he alone can maintain action for the possession. *Pickens v. Jones*, 63 Mo. 199; *Siemers v. Shraeder*, 84 Mo. 20-23; *Meyers v. Hale*, 17 Mo. App. 205.

It follows that the judgment of the circuit court is reversed and the cause remanded. All concur.*

*And so in *Bank v. Ragsdale*, 158 Mo., 668.

for plain.

✱ BANK v. HAYES.

112 Cal. 75. [1896.]

BELCHER, C. This action was brought to foreclose a mortgage executed by Edward Hayes and Richard V. Hayes to secure payment of a promissory note made by them to the plaintiff. The note was for \$3,000, bearing interest at the rate of 12 per cent per annum, compounding quarterly, and was dated December 20, 1887, and payable March 20, 1888. The mortgage was executed April 3, 1888. Edward Hayes died testate on Feb. 4, 1889. His will was duly admitted to probate, and Richard V. Hayes and Edward Dougherty were appointed and duly qualified as administrators of the estate with the will annexed. Notice to creditors was duly published, and within the time limited in the notice the plaintiff presented to the administrators, for allowance, its claim based on said note and mortgage; and the same was allowed and approved by them and by the judge of the court, and filed in the court among the acknowledged debts of the estate. The action is based on said claim, and was commenced April 26, 1892. The defendants are the two administrators and the widow and children of the decedent. The administrators and the other defendants answered separately. The answer of the administrator denied the non-payment of the note; denied that the interests or claims of defendants in the premises described were subsequent or subject to the lien of the plaintiff's mortgage; denied that the claim of the plaintiff was duly or properly presented to or allowed by the administrators or the judge of the superior court; denied that the plaintiff was the lawful owner or holder of said note or mortgage; and, as a further defense, set up that, prior to the commencement of the action, plaintiff pledged, assigned and delivered, said note and mortgage to the Savings Bank of San Diego as collateral security for the payment of an indebtedness of the plaintiff to said savings bank amounting to \$3,000, with interest thereon at 10 per cent per annum from said date, and that no part of said sum had been paid, and the savings bank still held the said note and mortgage as collateral security for the payment of said indebtedness. The answer of the other defendants set up the same defense as above, and, in addition thereto, that the cause of action was barred by the provisions of sections 337 and 1500 of the code of civil procedure. The court below found in favor

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of the plaintiff, and gave judgment foreclosing the mortgage, from which the defendants have appealed on the judgment roll, without any statement or bill of exceptions. * * *

2. Appellants contend that the plaintiff was not the real party in interest, and hence the action could not be prosecuted in its name. Section 367, Code Civ. Proc. The court below found that the plaintiff on the 13th day of March, 1889, delivered the said note and mortgage to the Savings Bank of San Diego without any indorsement or written transfer thereof, to secure the payment of an indebtedness of the plaintiff to the savings bank then existing, for the sum of \$3,000, with interest thereon; that no part of said indebtedness had been paid, and the savings bank still held the said note and mortgage as security for the payment thereof; that on May 15, 1889, the plaintiff, with the consent of the savings bank, presented the claim, based on said note and mortgage, to the administrators, and the same was allowed and approved by them and the probate judge, and filed and registered in court as alleged in the complaint; and that on the 26th day of April, 1892, this action was commenced by and in the name of the plaintiff, with the consent of the said savings bank. We do not think the delivery of the note and mortgage, without any indorsement or written transfer, constituted such a transfer as would deprive the plaintiff of the right to sue on them in its own name, with the consent of the transferee. At most, it was only a pledge, and, as between the pledgor and pledgee, the legal title remained in the former. And the rule is that, when a plaintiff holds the legal title to the demand, he is the real party in interest. O'Connor v. Irvine, 74 Cal. 435 (16 Pac. 236); Grant v. Heverin, 77 Cal. 263 (18 Pac. 647, and 19 Pac. 493). * * *

* See 203 Mo. 1

for plain.

MARTIN v. SCOFIELD.

41 Wis. 167. [1876.]

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Trover for 200 pine saw logs. Complaint in the usual form. Answer, a general denial.

It appeared on the trial, that in January, 1875, one Copper-smith cut the logs in controversy upon a lot claimed by the plaintiff, and sold and delivered them to the defendants, and

* So also, where notes are transferred for collateral security by commercial indorsement, the transferor may still sue on them, tho here the legal title passes to the trustee & transferee and

that the latter refused on demand to deliver such logs to the plaintiff or to pay for them, but appropriated the same to their own use. It also appeared that, before the logs were cut, the plaintiff sold to Coppersmith some trees standing on the lot, and authorized him to cut such trees and remove them from the lot. The testimony of the plaintiff is, that he only sold five trees to Coppersmith; while the latter testified that he purchased all the standing timber on the lot.

On the 20th of November, 1871, Mrs. Emeline S. Whitney, (Plam. claim who was then the owner of such lot, executed to the plaintiff a contract to convey to him the lot from which the logs in controversy were taken, upon his paying her \$200, with interest thereon, in one year from that time, in addition to \$57.04 paid at the time the contract was executed. There is indorsed upon the instrument a receipt for the interest to Feb. 1, 1875. Further reference to this contract will be found in the opinion. The lot was uncultivated and unoccupied when the plaintiff sold the trees to Coppersmith. *included in a contract sale, by w he was to a deed wh he paid a the price;*

The rulings of the court on the trial are sufficiently stated in the opinion.

The jury found for the defendants; a new trial was denied; and judgment for costs was rendered against the plaintiff; from which he appealed.

LYON, J. The controlling question in the case is, Did the plaintiff have such an interest in the logs in controversy that he can maintain trover therefor? To determine this question, it is necessary to consider the nature of his interest in the land from which the logs were taken. It has often been held that the relation between the parties to a contract for the conveyance of land is analogous to that of equitable mortgagor and mortgagee in fee of the land affected by the contract. And such is the relation the plaintiff and Mrs. Whitney sustain to each other in respect to the land in question.

The contract of Mrs. Whitney does not, in terms, give the plaintiff the right to the possession of the land; but it does so by necessary implication. It provides for reentry in case the plaintiff makes defaults in his payments; also for a right of distress upon the premises for arrears of interest; and contains the other clauses usual in such contracts, that, on default, the plaintiff may be regarded as a tenant holding over without permis-

sion of his landlord, and for the recovery of damages for waste. These clauses in the contract manifest unmistakably that Mrs. Whitney intended by it to vest in the plaintiff the right to the possession of the land.

Having such right of possession, he authorized Coppersmith to go upon the land and cut timber, and the latter did so. The act of Coppersmith under such license was the act of the plaintiff, whereby, in contemplation of law, the plaintiff entered into the actual possession of the land. Besides, the case is not barren of proof of other possessory acts on the part of the plaintiff. By his direction, his brother and agent went upon the land when Coppersmith was cutting the timber in controversy, and exercised acts of ownership thereon for the plaintiff. The plaintiff cannot reasonably be required to do more in order to take actual possession. We have no difficulty, therefore, in holding that when the logs were cut by Coppersmith, the equitable estate in the land upon which they were cut, and the possession and right to the possession of the land, were in the plaintiff. It follows, on the authority of *Northrup v. Trask*, 39 Wis. 515, that the plaintiff was the owner of the land, and of course of any timber cut upon it, subject only to the right of Mrs. Whitney as mortgagee, and that he alone could maintain trover or replevin for timber and logs taken therefrom without his consent. The case last cited is express authority that Mrs. Whitney cannot maintain an action against the defendants to recover the logs in controversy.

The learned county judge instructed the jury (among other things) as follows: "If the jury find from the evidence, that the plaintiff authorized Coppersmith to go on the land in question and cut timber on it, then your verdict must be for the defendants, although it might appear that Coppersmith cut more timber than he was authorized by the plaintiff to cut." This was equivalent to a direction to the jury to find for the defendants. It is manifest, from the above views, that the plaintiff may maintain this action for the logs cut by Coppersmith (if any) in excess of his license, and sold by him to the defendants; and the instruction above quoted is clearly erroneous.

Various other exceptions were taken to the rulings of the court on the trial; but it is deemed unnecessary to consider them. What has already been said will sufficiently indicate to

Plain. could recover here, on common law principles, since had possession & the trespass was an invasion of his right. But the Wisconsin courts apply some peculiar rules of real property. In Northrup v. Trask, 39 Wis., it was held that the

the county court what its rulings should be when the cause is again tried.

By the court.—Judgment reversed and cause remanded for a new trial.

for plain.

HOFFMAN v. CITY OF COLUMBIA.

76 Mo. App. 553. [1898.]

SMITH, P. J. This is an action by the plaintiff against defendant, a city of the third class, to recover damages occasioned by the action of the latter in changing the grade of certain designated streets in front of the property of the former, in pursuance of an ordinance passed for that purpose. At the time of the passage of the ordinance Mrs. Riggins was the owner in fee of the property and between that time and the change of the grade of said streets, she entered into a written contract with the plaintiff for the sale of the property and the execution of a deed therefor. The deed was not executed until a few days after the completion of the street improvement. The evidence abundantly shows that the property was greatly damaged by the grading of the streets. There was a trial resulting in judgment for the plaintiff and the defendant appealed.

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The defendant contends that inasmuch as the plaintiff was a mere vendee under an executory contract of sale that he was not such an owner of the property as entitled him to recover damages for injuries done thereto, prior to the time of the delivery of the deed to him. Our Practice Act—Revised Statutes 1889, section 1990,—requires that every action shall be prosecuted in the name of the real party in interest. The question here is, who was the real party in interest at the time of the injury to the property?

Snyder v. Murdock, 51 Mo. 175, was where defendant had given his notes for real property and the plaintiff had given bond for title. The carding machine and mill situate on the property were destroyed by fire before the payment of the notes or the making of the deed. In a suit on the notes the defendant pleaded as a defense that the carding machine and mill gave the property great value and were the main inducement to the purchase, etc. In the course of the opinion in the case, it is said

that: "After an executory contract for a conveyance of real estate has been entered into by the execution of a bond for title and notes for the purchase money, the property is at the risk of the purchaser. If it burns up, it is his loss; if it increases in value, it is his gain. This is the settled equity doctrine, and is based upon the principle that in equity what is agreed to be done must be considered as done."

In *Walker v. Owen*, 79 Mo. loc. cit. 569, the defendant, under a title bond, took possession of the premises. There was on the lot a store house of which the defendant took possession, under his contract, and used the same for several months and was so using it when it burned down. It is said by the court, in deciding the case, "that when a vendee thus takes possession of real estate, under a title bond, from the vendor, and the improvements thereon are destroyed, the loss falls on the vendee." *Snyder v. Murdock*, 51 Mo. 175. The defendant is not in a position to rescind the sale if he desired, for he cannot put the vendor in *statu quo* by restoring to him the property he obtained from him. See, also, *Deland v. Vanstone*, 26 Mo. App. 297; *Woods v. Straup*, 63 Mo. 433; *Tatum v. Brooker*, 51 Mo. 148.

It has been twice held by the supreme court of Michigan that where persons holding lands under a contract for sale which does not give them any possessory right therein before completion of payment therefor, can not, before such payment, maintain an action for damages done to such land, since they are not the owners of the freehold. *Moyer v. Scott*, 30 Mich., 345; *Des Jardins v. Boom Co.*, 54 N. W. Rep., 718. It does not appear, from the meager statement made in *Snyder v. Murdock*, supra, whether or not the vendee was put in the actual possession of the property, but it may be fairly inferred that such was the fact. That is the way it is to be understood. *Walker v. Owen*, supra.

It appears from the contract of sale that Mrs. Riggins should reserve in her deeds the rents, issues and profits of said property up to July 1, 1897—more than six months after the date of the injury—and that the plaintiff should not disturb the tenant in possession until the last-named date. It is thus seen that the plaintiff, at the time of the spoliation of the property, of which he complains, was not then in either the actual or constructive possession. Though the plaintiff had only a contract

This is not a case of trespass, but of permanent depreciation of the value of the property. Here plain. should not have been allowed to recover even if in possession, since there was no

for the conveyance to him of the title to the property, yet the action could have been maintained by him if he had been placed in the actual possession thereof by his vendor. There is nothing in the contract which had the effect to make the subsequent deed operate by relation back to the date of the contract. The plaintiff, by the terms of the former, was not entitled to the latter, until he made the payment of a certain amount of the purchase money and secured the remainder thereof in either one of the two ways stipulated. And as the land was not paid for, and the plaintiff could not have possession until after payment of part of the purchase money, the giving of the stipulated securities for the deferred payments, it is plain that the vendor had a valuable interest therein and not a mere naked title, and that an injury to the land was an injury to her. We, therefore, conclude that the plaintiff was not the real party in interest, in the statutory sense, and the action was improperly prosecuted in his name. It results that the demurrer to the evidence, interposed by the defendant, should have been sustained.

As the ruling just made is decisive of the case on the merits, it becomes wholly unnecessary to notice the question of the sufficiency of the defence pleaded by the answer and stricken out by the trial court on the motion of the plaintiff.

Judgment reversed. All concur.*

for del.

CASSIDY v. FIRST NATIONAL BANK.

30 Minn., 86. [1882.]

BERRY, J.: The defendant issued the following instrument, signed by its president:

"First National Bank,

"Faribault, Minnesota, June 1, 1880.

"Jerry Cassidy, Esq., has deposited in this bank \$1,050, payable to himself or order, in current funds, on the return of this certificate properly indorsed."

The money deposited was the property of plaintiff, by whom it was handed to Jerry Cassidy, her husband, to be deposited in the defendant bank in his or her name as he saw fit. Immediately upon receiving the certificate he delivered it to plaintiff,

*See also Olson v. Brooks Lumber Co., 89 Minn., 280.

who ever since he has had its exclusive possession and control, and has been the real owner of the debt evidenced by it. Before the commencement of this action she presented the certificate to defendant and demanded payment of the balance due thereon, at the same time informing defendant that she was its lawful owner and holder, and offering to surrender it upon payment. Defendant refused payment upon the ground that the certificate had not been indorsed, and was claimed by Jerry Cassidy as his own. In fact, it has not been indorsed.

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The certificate is in effect a negotiable promissory note. *Pardee v. Fish*, 60 N. Y., 265; *Klauber v. Biggerstaff*, 47 Wis., 551 (S. C. 3 N. W. Rep., 357). The fact that the sum named in it is payable "on the return" of the certificate does not raise a contingency affecting its character as such note. In the absence of these words, the duty to return upon payment would be implied, as in case of a negotiable promissory note in common form. Notwithstanding it is made payable to the depositor or his order, a third person may become its owner without indorsement. This is, in effect, determined in *Pease v. Rush*, 2 Minn., 107 (Gil. 89). In that case the title of a note made payable "to the order" of certain persons named was held to pass by delivery without the indorsement of the persons to whose order it was payable. That case also determined that the party acquiring title by such delivery without indorsements was the real party in interest, who was, therefore, under our practice, entitled to maintain an action upon the note in his own name. See also *Foster v. Berkey*, 8 Minn., 351 (Gil. 310); *White v. Phelps*, 14 Minn., 27.

It is impossible to distinguish the case at bar in principle from the cases cited. Here the sum named in the certificate is payable to Jerry Cassidy or his order upon the return of the certificate properly indorsed. In the case cited from 3 Minn., the sum named in the note was payable "to the order" of the persons named therein; that is, in legal significance, to those to whom they should order it to be paid by their indorsement, and upon the return or delivery up of the note. There is no substantial difference between the two cases. In either, title may be acquired by delivery, and thereupon the owner and holder, as the real party in interest, may maintain an action for the contents of the instrument in his own name. If in the one case the note, or in the other (as here) the certificate, is claimed by some person other than the plaintiff, the maker of the note or the cer-

tificate may protect himself by bringing the money into court and compelling an interpleader under section 131, c. 66, Gen. St. 1878. Judgment for the plaintiff was properly ordered and entered below, and is accordingly affirmed.*

for plain

HARTFORD & SALISBURY ORE CO. v. MILLER.

41 Conn., 112. [1874.]†

Action by the plaintiff corporation for the breach of the covenants of seisin and against incumbrances in a deed from the defendant to one Bristol.

On the 12th day of June, 1868, the defendant executed and delivered to Louis H. Bristol, as trustee, a deed, of which the following is the material part:

"Know ye that I, Monroe Miller, of the town of Salisbury, Connecticut, for the consideration of twenty-five thousand dollars, received to my full satisfaction of Louis H. Bristol, of the city and county of New Haven, as trustee of and for the sole use and benefit of the Hartford and Salisbury Ore Bed Company, hereafter to be organized under the joint-stock laws of this state, do give, grant, bargain, sell and confirm unto the said Louis H. Bristol as trustee aforesaid, that certain tract of land situate in said Salisbury, in the village of Lakeville, bounded and described as follows (describing it), containing about one hundred and fifty acres; excepting, and reserving to myself, my heirs and assigns, the two-acre lot lying directly in rear of the new academy, with a convenient right of way to and from the highway aforesaid. And I, the said Miller, do sell and convey the undivided one-seventh part of all the iron ore and other minerals in and upon said premises which I own in common with the heirs and devisees of John M. Holley, deceased. But it is understood that the said Holley heirs own the six-sevenths of said ore and minerals."

*See also McDowell v. Bartlett, 14 Ia., 157 (where a note was transferred to the plaintiff as "*equitable owner*" after the death of the legal holder).

Seattle National Bank v. Emmons, 16 Wash., 585 (where a renewal note was made payable to the assignor of the original note).

†Statement has been condensed.

Subsequently the plaintiffs received a charter and were incorporated by the General Assembly of this State, and thereupon afterwards Bristol, as trustee, on the 26th day of August, 1868, released to the corporation all his interest as trustee under the conveyance last above described. * * *

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of specialties.

CARPENTER, J.: The first question presented by this record is a very simple one. Who is entitled to sue for a breach of the covenants of seizin and against incumbrances contained in the deed from the defendant to Louis H. Bristol? It is conceded that these covenants do not run with the land; that they were broken, and that a right of action accrued the instant the deed was delivered. To whom did it accrue? Not to the plaintiffs certainly, for at that time the corporation was not in existence. The deed was to, and the covenants therein were with, Louis H. Bristol. The legal title, not only to the land, but to the rights of action arising from the conveyance, vested in him and in him alone. That he was a mere trustee matters not; it only shows that the right of action was in his name as trustee, and that the amount collected would be a fund in his hands for the *cestui que* trust.

The objection that the defendant might resist a suit brought in the name of the trustee on the ground that he personally paid no part of the consideration is more imaginary than real. The consideration was in fact paid to the defendant, and he acknowledged in his deed that he received it of Bristol. The fact that other parties furnished the money is immaterial. In contemplation of law, therefore, for the purposes of an action on these covenants, the consideration was paid by Bristol.

The statute (Gen. Statutes, tit. 1, sec. 64), authorizing the assignee and equitable owner of a chose in action, not negotiable, to bring an action thereon in his own name, does not aid the plaintiffs. The plaintiffs are the parties beneficially interested in the right of action, but they are not assignees of a chose in action. Mr. Bristol conveyed the land by a quitclaim deed in the ordinary form, but he did not assign or attempt to assign a chose in action. Had he done so, and had the plaintiffs in their declaration alleged that they were the actual and *bona fide* owners of the chose in action mentioned therein, and set forth when and how they acquired title thereto, as required by the statute, their claim in this respect might have been sustained. As it is, we think it cannot be. * * *

for def.

STOLL v. SHELDON.

13 Neb., 207. [1882.]

By the Court: This case was before this court in 1881, and is reported in 11 Neb., 272, the facts being stated and a copy of the note sued on being given in that case. Stoll signed the note in controversy as surety, and now relies upon two defenses: First, that the action is not brought in the name of the real party in interest; second, settlement with one Hutchinson, an attorney of the plaintiff. The note was made payable to "S. L. Sheldon, or order." The testimony shows that Sheldon, at the time the note was given, and now is, the agent of the Meadow King Mower for Gregg & Co., who are the real owners of the note. (The code requires the action to be brought in the name of the real party in interest, but excepts trustees of express trusts, executors, and administrators, and persons in whose names contracts are made for the benefit of others.) Judge Bliss has referred to the cases bearing upon this question. See section 57, Code Pleadings; and Pomeroy, more fully, in Remedies and Remedial Rights, §§ 171-182. The law seems to be definitely settled, by the decisions referred to, that when a contract is entered into with an agent in his own name, the promise being made directly to him, he may maintain an action on such contract in his own name without joining the person beneficially interested, but the defendant would not thereby be deprived of any defense he might have to the action. The first objection of the plaintiff, therefore, is not well taken. * * *

note paid
to agent
in own
for benefit
principal

Agent can
sue on the

Judgment affirmed.

THOMPSON v. FARGO.

49 N. Y., 188. [1872.]

Appeal from judgment of the general term of the supreme court in the first judicial department, affirming a judgment in favor of plaintiff entered upon the report of a referee. (Reported below, 58 Barb., 575; 44 How. Pr. R., 176.)

Action in

This action was brought to recover damages for an alleged failure of defendant to deliver a package of United States treasury notes received by it for transportation.

Facts found by the referee: That the defendant, the American Express Company, is a joint stock company, consisting of more than seven members, and is engaged in the express business as common carriers, whose principal office is in the city of New York.

On or about the 11th day of August, 1865, the American Express Company received from the United States Express Company, at Decatur, in the state of Indiana, a package, containing United States compound interest notes, and 7.30 Treasury notes, to the amount of \$660.63, together with papers discharging John and William White from service in the army of the United States.

That said package was addressed as follows: "By the United States Express Company, \$660.63, John and William White, care Captain James K. Martin, Bunton House, Terre Haute, Indiana."

The package was delivered to the United States Express Company by plaintiff at Springfield, Ill., and receipt taken.

The American Express Company conveyed it to the place of destination without delay. Diligent search and inquiry were made for the consignees, but they could not be found or heard from.

The contents of the package was the back pay of the said John and William White, as soldiers in the army of the United States, and their discharge papers from the service, and a letter from the plaintiff.

The Whites had employed the plaintiff as their agent to collect for them the back pay in question from the United States government.

The enclosure in the package was the proceeds of a check received by plaintiff, from the government agent at Springfield, Illinois, for such back pay.

The plaintiff demanded the package in question from James C. Fargo, the treasurer of the defendant, at the city of New York, who refused to deliver the same to him.

PECKHAM, J.: To sustain an action against a common carrier for failing to deliver goods, the plaintiff must be the owner, or have some special interest in them. (Krulder v. Ellison. 47 N. Y., 36; Green v. Clarke, 12 N. Y., 343.) *Prima facie* the consignee is the owner.

If this had been a sale of goods by the consignor, ordered by

the consignee, without stating in what way or manner to send them, but only where, the consignor would have had sufficient title to maintain the action, because the title in such case, as a general rule, would not pass by the mere delivery to the carrier. In this case, however, the plaintiff never owned the money ordered to be sent to the consignee, and had no special interest in it. He was a mere agent. Hence if he simply fulfilled the orders of the owners and sent the money to the consignee by a suitable and proper conveyance, his duties and liabilities were discharged. He then had no further right or interest in the matter.

The action was brought and tried upon the assumption that the plaintiff properly collected and sent the money due from the government to the Whites. There was no allegation or suggestion that he had not sent the money he received by the usual and proper mode, that he had not fulfilled the directions of the Whites, that he was not authorized by them to do precisely what he did—the referee has substantially so found as a matter of fact, and there is no exception to any of his findings of fact. It is too late here for the plaintiff to attempt to vary these findings of fact to sustain his judgment.

It is the right and interest of the defendant to see that the package is delivered to none but the true owner. A wrongful recovery against this defendant will afford it no defense as against the true owners or their representatives.

This is not a case of a fictitious consignee. The Whites were alive and in the civil war. This was their pay, and if they have died since this proceeding, that gives no right to this plaintiff to sue upon these facts. It follows that the referee erred in finding for the plaintiff, and the judgment of the general term affirming that judgment must be set aside and a new trial granted, costs to abide event.

All concur, except Allen, J., not sitting, and Rapallo, J., not voting.

Judgment reversed.

for def.

This case can be distinguished from the following on the ground that here the action is in rem, and plain. had no right of ownership; while in Waterman v. R. R. Co., the action was in personam, based upon the contract

consignee who is agent of consignor cannot sue for conversion of property entrusted to a common carrier

WATERMAN v. C., M. & ST. PAUL RAILROAD CO.

61 Wis. 464. [1884.]

unjust excessive charge on "in person"

On or about February 2, 1880, in consideration of \$90 then paid, the defendant, at Darien, Wisconsin, agreed with the plaintiff in writing to transfer one carload of goods consisting of household goods, farming implements, one pair of horses, and some lumber, described therein as the property of the plaintiff, from said Darien to Plum Creek, in the state of Nebraska. The writing recited that the property was received of the plaintiff at the former place and consigned to him at the latter place. As a part of the contract the plaintiff therein released the defendant from certain liabilities, and was to and did accompany the property; and for that purpose was to and did receive a free pass from the defendant. When the car reached Plum Creek, the railroad company having the same in charge refused to deliver the property to the plaintiff unless he would pay an extra charge of \$32.28 over and above that already paid, as expressed in the contract, as freight, and in compliance with that exaction the same was then and there paid, and the property delivered to the plaintiff, and this action is to recover back the amount of such excessive charge so exacted and paid. It appears as a matter of fact, that the property belonged to Charles Nowlan; that the negotiations for the carriage were conducted by his brother, O. F. Nowlan; that the agreed freight (\$90) was paid by Cheesbro, the father-in-law of Charles Nowlan; that at the time of the loading of the car Cheesbro started to sign the contract in behalf of Charles Nowlan, when the defendant stopped him, and insisted that as the plaintiff was to accompany the goods and receive them at Plum Creek, he should execute the contract, which he accordingly did, and that recited that \$90 was received of Cheesbro for the plaintiff. It further appears that the amount of the extra charge exacted at Plum Creek was, in fact, furnished and paid by Charles Nowlan in the presence and with the consent of the plaintiff. The answer consists of a general denial merely. Upon the trial the jury found for the plaintiff, and assessed his damages at the amount of such excessive charges and interest, and from the judgment entered thereon this appeal is brought.

CASSODAY, J. Notwithstanding the plaintiff is described in the contract of carriage as consignor, consignee, and sole owner,

yet the defendant seeks to escape liability for the repayment of the excessive exaction on the sole ground that the plaintiff was not the owner of the property, and did not personally furnish and pay the overcharge. Is such a defense available? The question has elicited much discussion, and the adjudicated cases upon it present a considerable disagreement. We make no attempt to reconcile an irreconcilable conflict. It is enough to know that our conviction as to the law applicable has the sanction of respectable authority, and especially under our statute as it has been construed by this court. The question is not whether the owner could have maintained the action, for he did not bring the action. There seems to be no dispute that, where there is nothing appearing to the contrary, the consignee is presumed to be the owner of the property, and as such may maintain an action for its loss or depreciation in value by reason of the negligence of the carrier. Undoubtedly this presumption may be overcome by evidence. A consignor may have a right of action against the carrier by reason of ownership. So he may have such right of action on privity of contract. The contract seems to be controlling, at least to a certain extent, in all cases. Evans v. Marlett, 1 Ld. Raym. 271; Davis v. James, 5 Burr. 2680; Mason v. Lickbarrow, 1 H. Bl. 357; Moore v. Wilson, 1 Term. R. 659; Joseph v. Knox, 3 Camp. 320; Dunlap v. Lambert, 6 Clark & F. 600; Freeman v. Birch, 3 Q. B. 492; Blanchard v. Page, 8 Gray, 281; Finn v. R. R. Co., 112 Mass. 524; Carter v. Graves, 9 Yerg. 446; Northern Line Packett Co. v. Shearer, 61 Ill. 263; Southern Exp. Co. v. Craft, 49 Miss. 480. A careful analysis of these cases will be found in a well written article by Judge Hieree, of Tennessee, in 7 South. Law Rev. (N. S.) 255-283.

It appears that much depends upon the nature of the act complained of and the character of the action. Thus, in Carter v. Graves, *supra*, it was said—"that, in all actions on the case against a carrier for a loss or injury done to property, the wrong is the gist of the action, and the contract to deliver collateral to it. In all actions of assumpsit for not delivering according to contract, the contract to deliver is the gist of the action, and the loss or injury sustained is collateral thereto." In several of the cases above cited, an action for the breach of the contract was maintained by a party to the contract having no ownership or interest in the property carried. Thus, in Joseph

In assumpsit against the common carrier the contract is the controlling fact

v. Knox, *supra*, the plaintiffs had no ownership nor interest in the goods, but, as shippers, were parties to the contract, and it was held that they might maintain the action upon the bill of lading for the failure to deliver and carry. Lord Chief Justice Ellenborough observed that, "there is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs, and that the freight for them was paid by the plaintiffs in London. To the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable for the non-delivery of the goods. After such a bill of lading has been signed by his (the carrier's) agent, he cannot say to the shippers that they have no interest in the goods, and are not damnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner."

So in Hooper v. Railway Co., 27 Wis. 91, it was said that "the shipper is a party in interest to the contract, and it does not lie with the carrier who made the contract with him to say, upon a breach of it, that he is not entitled to recover the damages unless it be shown that the consignee objects; for without that it will be presumed that the action was commenced and is prosecuted with the knowledge and consent of the consignee, and for his benefit. The consignor or shipper is, by operation of the rule, regarded as a trustee of an express trust, like a factor or other mercantile agent who contracts in his own name on behalf of his principal." Here the defendant contracted solely with the plaintiff. In the contract, the defendant, with full knowledge of the facts, recognized the plaintiff as the sole owner of the property. The freight had been fully paid in behalf of the plaintiff. To him, the defendant, in consideration of such payment, expressly agreed to deliver the property at the place of consignment. This express agreement was broken by the refusal to so deliver, except upon condition of the further payment of the unauthorized exaction. This unauthorized exaction was complied with when the delivery was made. Having broken the contract, and received the overcharge in consequence of the breach, the defendant seeks to escape liability for the breach on the ground that the only party with whom it contracted was not in fact the owner of the property, and did not personally furnish and pay the overcharge exacted as a condition of the

delivery. To hold such a defense available would, in effect, abrogate an express written contract. One exception to the statutory rule that "every action must be prosecuted in the name of the real party in interest" (section 2605), is that "a trustee of an express trust * * * may sue without joining with him the person for whose benefit the action is prosecuted." Section 2607. "A trustee of an express trust, within the meaning of this section," must "be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." Id. By amendment these provisions have been made applicable to actions brought in justice courts, as this was. Subdivision 27, § 2, c. 194, Laws 1879. If the consignor or shipper could properly be "regarded as trustee of an express trust," under this statute, as held in *Hooper v. R. R. Co.*, *supra*, then certainly the person described in the contract as consignor, consignee, and sole owner, and for whom the freight has been paid, must also be regarded as a trustee of an express trust under the statute. *Allen v. Kennedy*, 49 Wis. 549 [S. C. 5 N. W. Rep. 906].

One rule is stated in the contract of carriage to the consignor, consignee and sole owner, who recover in a contract if he is the real owner.

The judgment of the circuit court is affirmed.*

for plain.

STILLWELL v. HURLBERT.

18 N. Y. 374. [1858.]

Appeal from the supreme court. Action upon a bond to the plaintiff, sheriff of Oswego, reciting the issuing of an execution directed to the plaintiff against one Eri D. Harrington, and that certain goods and chattels which appeared to belong to the latter were claimed by Wm. H. Harrington and conditioned to indemnify the plaintiff and all persons aiding or assisting him in the premises, from all damages for levying upon and selling the property. The breach was the recovery, by one Capron, of a judgment against Lee, a deputy of the plaintiff, for the seizure and sale by the latter of the property levied upon; the payment by Lee of the judgment and costs of defending the action in which it was recovered, and the neglect of the defendants to indemnify Lee. The complaint stated an assignment by Lee,

Bond to indemnify plain. (also against damages arising from a loss in favor of Lee); and indemnify all persons aiding him.

*See also *Snyder v. Adams Express Co.*, 77 Mo., 523.

to the plaintiff, of his interest in the bond and of his right of action, by reason of the facts stated. Upon the trial there was a failure to prove that the assignment was ever delivered to the plaintiff, or that he knew of its existence. The defendants moved for a non-suit, which was denied. The plaintiff had a verdict, which the supreme court, at general term in the fifth district, refused to set aside; and judgment thereon having been perfected, the defendants appealed to this court.

HARRIS, J. At the time the bond upon which this action is brought was executed, the plaintiff was sheriff of Oswego and Lee was his deputy. An execution in favor of the defendant against one Harrington, had been delivered to Lee as such deputy, and property in the possession of the defendant in the execution had been seized by him. To induce the deputy to sell the property thus taken in execution, and which might belong to some other person, the defendants, who were plaintiffs in the execution, executed the bond in question. Aware that any person claiming the property which had been taken might, at his election, sue either the sheriff or the deputy, it was made a condition of the bond, that the defendants should indemnify not only the sheriff, but "all and every person and persons aiding and assisting him in the premises." In respect to the deputy who held the execution, and who in fact received the bond, the plaintiff became the trustee of an express trust. The obligation was executed to him for the benefit of his deputy. It is the precise case for which provision is made in the 113th section of the code. The suit was properly brought in the name of the sheriff. The deputy having been sued for the price of a wagon he had sold under the defendant's execution, and a judgment having been recovered against him, the defendants became liable, according to the condition of their bond, for the amount recovered against him, together with the expenses incurred by him in defending the action. Without reference, therefore, to the assignment of the demand to the plaintiff, or whether such an assignment was perfected or not, the action was well brought and the recovery right.

The judgment of the supreme court should therefore be affirmed.

for plain.

McCOMAS v. COVENANT MUTUAL LIFE INS. CO.

56 Mo. 573. [1874.]

ADAMS, Judge, delivered the opinion of the court.

This was an action on a life policy issued by the defendant on the 29th day of October, 1862, insuring the life of Harry G. McComas, husband of the plaintiff, in the sum of five thousand dollars. The consideration on the face of the policy, and by reference to a statement on the margin, is expressed to be paid for the use and benefit of the plaintiff, the wife of the assured.

*Blain was
beneficiary
a policy of
insurance
her husband
life.*

The policy was issued to the husband, and the covenant is to pay to him, his executors, administrators or assigns, in sixty days after due notice and proof of death, the sum assured, the balance of the year's premium, if any, being first deducted therefrom together with all indebtedness of the party to the company.

The annual premium to be paid was one hundred and eighty-nine dollars—ninety-five dollars of which, was to be paid in money in two equal installments of \$47.50, and ninety-four dollars in annual notes. The husband died on the 3rd day of June, 1871, leaving the last six annual premium notes unpaid.

This suit was commenced on the ninth day of December, 1871, by the plaintiff as beneficiary under this policy, for the amount assured. The defendant filed a demurrer to the petition upon the ground that the plaintiff could not sue as beneficiary on this policy. This demurrer was overruled, and the same point was afterwards raised by motion in arrest and saved by an exception to the action of the court in overruling the motion. * * *

First—The first point relied on by the defendant is, that this action cannot be maintained by the plaintiff on the policy of insurance, because by the terms of the policy the sum assured was to be paid to the deceased or his executors, administrators or assigns. This objection was raised by motion in arrest, and also on the trial by objection to the admissibility of the policy of insurance as evidence. It is manifest, from the recital in the policy in regard to the consideration to be paid as premium, that this insurance was effected by the husband for the sole benefit of his wife. The husband, therefore, was constituted a trustee for his wife. He became a trustee of an express trust and his wife was the beneficiary. Our statute allows a trustee of an express trust to sue in his own name without joining with

him the person for whose benefit the writ is prosecuted. (2 Wagn. Stat., 1000, sec. 3.) But this statute does not preclude the beneficiary under a contract like this from prosecuting a suit without joining the trustee. This contract on its face was made for the benefit of the wife alone, and she is, therefore, the real party in interest and had the right to bring this suit. A recovery by her would be a bar to another action by the trustee. In *Rogers & Peck v. Gosnell* (51 Mo., 466) it was held, that either the trustee or beneficiary of a contract might sue, and a recovery by either would be a bar to another action. (*Miles v. Davis*, 19 Mo. 408; *Harney v. Dutcher*, 15 Mo., 89; *Van Schaick v. R. R.*, 38 N. Y., 346; *Record v. Sanderson*, 2 How., 179; *Carter v. The Mayor of Albany*, 43 N. Y., 399; *Lawrence v. Fox*, 20 N. Y., 268.)*

Judgment affirmed.

for plain

IN RE ROTHERHAM ALUM CO.

L. R. 25 Ch. D. 103. [1883.]

COTTON, L. J. This is an appeal by Mr. Peace from the refusal of Vice-Chancellor Bacon to vary the Taxing Master's certificate. The facts are shortly these. Mr. Peace was the solicitor employed by Mycock, the promoter of the company, to do what was necessary for the formation of the company, and was afterwards employed by the company about the conveyance to the company of the property purchased by it from Mycock. The company was formed, and was afterwards ordered to be wound up. Mr. Peace carried in a claim for a bill of costs, part of which is for work done on the retainer of Mycock before the formation of the company. The Taxing Master has disallowed this part of his bill, and the Vice-Chancellor has affirmed his decision.

On what ground can these costs be claimed against the company? The appellant relies on the agreement between the company and Mycock, that the company should pay all the costs incidental to the formation of the company, and on subsequent transactions to which I shall presently refer.

*For a full discussion of this subject see article by Professor Wiliston, 15 *Harvard Law Review*, 767.

Now first as to the contract between Mycock and the company, that the company should pay Mycock the costs incurred by him about forming the company. That contract could not give Mr. Peace any direct claim against the company. We thought, however, that Mr. Peace might be held entitled to stand in the place of Mycock against the company, and the case stood over that it might be ascertained whether the company had any claims against Mycock. It now appears that the company have claims against Mycock which would neutralize any claims by him against them, so Mr. Peace cannot have any relief on that footing.

Then it is said that the company has had the benefit of Mr. Peace's services, and ought to pay for them. That argument cannot in my opinion prevail. The business was done on the retainer of Mycock, and the company are purchasers from him. They get the benefit of Mr. Peace's services in no other way than a purchaser gets the benefit of work done by the vendor on the property. In such a case, even if there is a contract by the purchaser with the vendor to pay all the expenses of the work, that will not give the workmen a claim against him. The case of *In re Hereford and South Wales Waggon and Engineering Company** was relied on, where it was said that but for the equitable ground of defence there set up Walter and Head would have had a good claim, but in that case the services were not done on the retainer of any other person who was liable to pay for them. In the same case Bramwell, who had been employed by Walter and Head, and urged that the company had taken the benefit of his services, was held to have no claim against the company. The present case, therefore, is disposed of by authority. * * *

LINDLEY, L. J.: I am of the same opinion. I will first consider the question whether any verbal agreement between the company and Mr. Peace that the company should pay him, is made out. The case is in a peculiar position, for no one appears to oppose the claim of Mr. Peace, or to sift the evidence adduced by him. On perusing Mr. Peace's affidavit I was inclined to think that he had made out his case; but on examining the minute book I find no corroboration of his evidence, there being no mention of his claim in the minutes of the 27th of February, 1881, and the resolutions of the 21st of December in that

*2 Ch. D., 621.

year being consistent with either view of the case. I do not throw any discredit on Mr. Peace, who, no doubt, has given to the best of his belief, a truthful account of what took place at the meeting in February; but my impression is that there was nothing more than a loose conversation which could not constitute an agreement binding on the company. The burden of proof lies on Mr. Peace to show an agreement and I have arrived at the conclusion that though there is evidence to go to a jury of the existence of an agreement the evidence is insufficient to establish it.

Then can Mr. Peace apart from any such agreement establish his claim? In my opinion he cannot. The articles of association bind the company to pay these costs; but Mr. Peace was no party to the articles which only constituted an agreement between the company and Mycock. If he had brought this action against the company with no materials except proof that he had done the business, and the provisions in the articles, he could not have succeeded. This is shown by many cases, amongst which I may refer to *Eley v. Positive Government Security Life Assurance Company**, where it was held that articles of association do not constitute a contract between the company and an outsider. A provision in an act of Parliament may enable an outsider to sue. There is in such cases a statutory obligation of which the person named can take the benefit—an action for debt on a statute being a well known old form of action at Common Law; but an agreement between A. and B. that B. shall pay C., gives C. no right of action against B. I cannot see that there is in such a case any difference between Equity and Common Law, it is a mere question of contract. It is said that Mr. Peace has an equity against the company because the company has had the benefit of his labor. What does that mean? If I order a coat and receive it, I get the benefit of the labor of the cloth manufacturer; but does any one dream that I am under any liability to him? It is a mere fallacy to say that because a person gets the benefit of work done for somebody else he is liable to pay the person who did the work.

Judgment affirmed.

*1 Ex. D., 20, 88.

No recovery

WILLIAMSON v. MICHIGAN FIRE INSURANCE CO.

86 Wis. 393. [1893.]

Action by John E. Williamson against the Michigan Fire & Marine Insurance Company on a policy of insurance. Judgment for plaintiff. Defendant appeals. Reversed.

The other facts fully appear in the following statement by PINNEY, J.:

This action was brought to recover a loss which occurred under a policy of insurance issued by the defendant April 7, 1891, to the estate of Jennie Stillwell. On the 2d day of August, 1883, Jennie Stillwell was the owner of the property insured, and on that day executed and delivered a note and mortgage securing the same on the premises in question to Jennie Perkins for \$500, no part of which has been paid; and on the 4th day of April, 1891, the plaintiff became the owner of this note and mortgage. Prior to the date of the policy, Jennie Stillwell, the mortgagor, died, leaving one child, Jennie Stillwell, her sole heir at law, and the owner of the premises. No administrator has ever been appointed on the estate of said Jennie Stillwell, deceased, but on the 7th day of April, 1891, the said policy of insurance was issued by the defendant company to "the estate of Jennie Stillwell," whereby it is claimed that the defendant did insure said estate of Jennie Stillwell, for the period therein stated, against loss or damage by fire, in the sum and to the amount of \$400, on the one-story, frame, shingle roof building, occupied as a dwelling house and millinery store, on lot 23, block 4, etc., in Neenah, Wis., "loss, if any, first payable to Jennie Perkins or assigns, as her mortgage interest may appear." Plaintiff alleged in his complaint that as mortgagor, from and since the 4th day of April, 1891, he had an interest in the property so insured in an amount exceeding said insurance, to-wit, in the sum of \$500. The property thus insured was entirely destroyed by fire November 18, 1891, and the plaintiff brings this action for the recovery of the sum named in the policy. The defendant, in its answer, alleged, among other things, that the plaintiff had not at the time of the loss, nor at any time since, any title to or interest in the property in question, except jointly and individually with one Jennie Stillwell; that she was the owner in fee thereof, and that she had an interest in the property, the subject of the action, jointly with the plaintiff; and that she is still living, and

the heir at law of Jennie Stillwell, deceased. Upon trial before the court without a jury, the court held that the plaintiff had a right, upon these facts, to recover in his own name, and gave judgment accordingly, from which the defendant appealed.

PINNEY, J. (after stating the facts.) The plaintiff could not maintain an action upon the policy in question as sole plaintiff. The legal right of action was in the insured, and the provision in the policy, "loss, if any, first payable to Jennie Perkins or assigns, as her mortgage interest may appear," operated only as a conditional appointment or order to pay so much of the proceeds of the policy as might be equal to the amount due on the mortgage at the time of, and in the event of, a loss under it. It was not operative in *praesenti*, and the insured was still the owner of the policy. If the mortgage was paid before any loss occurred, it could not become effective. These considerations serve to show that, whether the mortgage debt be greater or less than the amount of the policy when written, such a provision in favor of a mortgagee does not operate as an assignment of the policy. It is still the owner of the premises who is insured, and the contract of the company is with him alone, and the continued validity of the policy is dependent upon the performance by him of the conditions embraced in it. It is not the interest of the mortgagee in the premises that is insured; and it seems clear, therefore, that an action for the recovery of the money in case of loss must be brought in the name of the insured, but that the mortgagee, in respect to his interest, may be joined with him as coplaintiff. The recent cases of *Hodgson v. Insurance Co.*, 56 N. W. 920 (at the present term,) and *Chandos v. Insurance Co. (Wis.)* 54 N. W. 390, are decisive of the question involved. 2 Wood, Ins. 1122; *Martin v. Insurance Co.*, 38 N. J. Law, 140; *Insurance Co. v. Davenport*, 37 Mich. 613; *Wabasse v. Insurance Co.*, 42 N. J. Law, 206,—may be referred to in addition to the authorities cited in these cases. It is not the interest of the mortgagee that is insured, but the interest of the mortgagor; and it seems illogical to say that whether such an appointment will operate as an assignment of the policy, if it can so operate at all, is dependent upon whether the sum due on the mortgage is greater or less than the amount of the loss. The company says, in substance, to the insured: "In consideration of the stipulated premium, we insure you against loss by fire on the property described, in the sum of \$400; and at your request, in case

a loss occurs, we will pay it to J. P., to the extent that any sum may then remain due on his mortgage." This is clearly not an assignment of the policy, so that in case of loss the mortgagee alone may sue and recover for it. It is no more than a conditional appointment or agreement for the future appropriation of all or a part of the moneys that may become due under the policy, according to future events, depending for its operation upon an actual loss, and something remaining due on the mortgage. The case is not one of a defect of parties, but of a want of sufficient interest in the plaintiff to enable him to recover. The judgment of the county court is erroneous, and must be reversed.*

for self. ✓

KENT v. DANA.

100 Fed. 56. (C. C. A.) [1900.]†

This action was brought by Edward Dana, who was the plaintiff in the court below, and who is the defendant in error here, to recover upon 75 interest coupons of \$30 each, maturing, part of them, Sept. 1, 1896, part March 1, 1897, and the remainder Sept. 1, 1897. These coupons were originally attached to certain refunding bonds, being part of an issue of such bonds issued by the village of Kent, the defendant below, which is a municipal corporation in Portage county, Ohio. The bonds bear date March 1, 1892, and were numbered from one to eighty, respectively, being for the sum of \$1,000 each. The bonds are not yet due. * * *

SEVERENS, District Judge, having stated the case, delivered the opinion of the court.

* * * * * 3. Upon the question of the right of the plaintiff to bring the action we think there is no difficulty. Doubtless it was competent for the defendant to show that the savings bank had the beneficial interest in the subject of the suit in order to let in any defense which it might have as against the bank; but it had no further interest in the matter. Assuming that the Savings Bank delivered these coupons to

*But see *Cone v. Ins. Co.*, 60 N. Y., 619, where it was held that the mortgagee, to whom the loss was made payable, was the proper party to sue, and it was said that he was the only one who could sue.

†Statement has been condensed.

Dana for the purpose of enabling him to bring suit upon them, that he gave his check therefor, and that it was understood between them that he should turn over the proceeds of the collection to the bank, and take up his check,—which is a construction of the evidence as favorable to the defendant as it would bear,—still this would suffice to enable him to bring the suit in his own name. His right to recover would be no larger than that of the bank. In that respect he would stand precisely in its position, and, if the bank was a bona fide holder, he would recover in that character. The title to negotiable paper payable to bearer passes by delivery, unless the attendant circumstances show that such was not the intention. But here the bank transferred these coupons for the purpose of enabling him to bring suit. It is implied in that, that such title would pass as would enable him to sue, for without it the object of the transfer could not be accomplished. Possession of such paper where it is payable to bearer, or where it is payable by indorsement to the holder, coupled with an authority to bring suit upon it, is sufficient for that purpose. In *Law v. Parnell*, 7 C. B. (n. s.) 282, the action was brought in the name of an agent as custodian of paper held for another, but indorsed in blank, the agent being authorized by his principal to bring suit upon it. It was held that he had sufficient title to maintain the suit, *Earle, C. J.*, saying:

“The bill being indorsed in blank, the bank had the right to hand it over to a third person to sue upon it, without indorsing it; and therefore the plaintiff, if he was the lawful holder of the bill, and had authority from the bank to do so, had a perfect right to sue upon it.”

This case was directly approved in the case of *Obrien v. Smith*, 1 Black, 99, 17 L. Ed. 64, where the suit was brought by the cashier of a bank upon a note belonging to it, but of which he had control for its use. In affirming a recovery against the objection that the plaintiff could not recover in his own name, Chief Justice Taney, speaking for the court said:

“The authorities referred to by the counsel for the defendant in error are conclusive, and it cannot be necessary to discuss these questions, which we consider as too well settled to be now open to serious controversy.”

The case of *Boyd v. Corbitt*, 37 Mich. 52, is precisely in point. There Boyd, who was a collecting agent for one Martin, received

from him a note indorsed in blank, and brought suit thereon in his own name; and it was held that he had sufficient title on which to maintain the suit.

Where, as in Ohio, the code of procedure requires that the suit shall be brought by the real party in interest, it is nevertheless held that, when the plaintiff is the lawful holder of the note, it is no defense to the maker to show that the transfer under which the plaintiff holds it is without consideration, or subject to equities between him and his assignor, or colorably, and merely for the purpose of collection, and that it is sufficient if he have the legal title, either by written transfer or delivery, whatever may be the equities of his relation with his assignor. *White v. Stanley*, 29 O. St. 423; *Eaton v. Alger*, 47 N. Y. 345; *Hays v. Hathorn*, 74 N. Y. 486; *Cottle v. Cole*, 20 Iowa 481. * * *

We think there is no error shown in the record, and the judgment of the circuit court is accordingly affirmed.

GAY v. ORCUTT.

169 Mo. 400. [1902.]

ROBINSON, J. This action was begun in the Grundy Circuit Court on December 28, against the defendants as officers of the Citizens' Bank of Jamesport, Missouri, to recover certain deposits alleged to have been received by the defendants between July 12, 1892, and July 13, 1893, when the bank was known by the defendants to be insolvent or in failing circumstances. On defendants' application a change of venue was awarded to the circuit court of Chariton county.

The petition is in thirty-six counts, each predicated on section 2760, Revised Statutes, 1899, which makes the officers of a bank individually responsible for deposits received with their assent after they have knowledge that the bank is insolvent or in failing circumstances.

In order to avoid a multiplicity of suits, the depositors assigned their claims to the plaintiff, and this action was begun in his own name. The case was tried before a jury and resulted in a verdict and judgment for plaintiff, and defendants have appealed.

The first of the series of errors necessary to notice which have

been assigned by the defendants for a reversal of the judgment relates to the action of the court below in allowing this action to be prosecuted in the name of John L. Gay, and refusing to dismiss the same on the stipulation between plaintiff, John L. Gay, and the defendants for that purpose. It is claimed by defendant that under our statute (sec. 540, R. S. 1899), requiring suits to be brought in the name of the real party in interest, the assignee of the cause of action is regarded as the real party in interest and he is allowed to dismiss or otherwise control the conduct of the case to the exclusion of the assignors, where suit is brought on the assigned accounts.

The contention on the behalf of the depositors was that, where, as here, the assignee refuses to further prosecute the action, the court will upon indemnity as to cost and damages, permit the cause to proceed in the assignee's name, and not allow the latter to dismiss or discontinue the action. It seems that this case was originally commenced in the Davies Circuit Court, but afterwards dismissed, and the cost, amounting to some sixty odd dollars, taxed against the plaintiff Gay. Whereupon the present suit was instituted, and afterwards an execution was issued against Gay for the costs in the Davies Circuit Court, and demand made upon him therefor.

Becoming apprehensive about the accumulation of the cost, he informed the counsel for the defendants that he never authorized this action to be brought, and entered into a stipulation with them to dismiss the cause upon defendants paying the costs which had been adjudged against him in the Davies Circuit Court, together with all cost which had or might accrue in the present suit up to the time of such dismissal. In the meantime, however, having learned of the contemplated dismissal and before the same was consummated, but after the filing of the above stipulation, the depositors filed a motion to have the case proceed in Gay's name for their use and benefit. The motion was sustained by the court upon the depositors giving bond in the sum of one thousand dollars to indemnify him against cost and damages, and defendants saved their exceptions to this action of the court.

The plaintiff thereupon filed a motion to dismiss the suit on the grounds that he did not authorize the action to be brought, the said suit, having been instituted without consulting him or without his knowledge or consent, and that he had no knowl-

edge of the assignment of the said claims to him and never agreed with the assignors to bring this suit or authorized any other person to do so. The court overruled this motion and the defendants excepted.

At common law in the case of assignments of causes of action, arising *ex contractu*, all suits upon such assigned causes of action, with the exception of negotiable instruments, must be brought in the name of the party vested with the legal interest in the contract, and not in the name of the assignee. Code of Civil Procedure, Revised Statutes, 1899, section 540, however, has made a change in the relation to parties to actions. Under the provisions of this section, the assignee of the cause of action arising *ex contractu* is the real party in interest, and as such may maintain the action in his own name, regardless of any collateral agreement between himself and the assignor of the proceeds. This is now the settled doctrine in this state (*Guerney v. Moore*, 131 Mo. 650).

The plaintiff being the real party in interest undoubtedly had the exclusive right to control the action and might dismiss or discontinue the case without assignor's sanction. The assignors being strangers to the action will not be allowed to interfere in the suit to prevent a dismissal of the case or otherwise control the conduct of the case. Equally, of course, the assignors had no standing in court to submit a motion to carry on the suit in Gay's name after he had refused to prosecute the same. This doctrine is affirmed and settled by many authorities.

The right of a stranger to a suit to interfere with its process or conduct came up for decision in *Hoover v. Railroad*, 115 Mo. 77. There it was held that none but parties to suits will be permitted to interfere with or control the conduct of the suit. The court in that case said, "The general rule that none but parties to a suit will be allowed to interpose in its control obtains in this state as well as in other jurisdictions."

A similar rule was applied in *State ex rel. v. Clymer*, 81 Mo. 122. To the same effect in *Fiske v. Lamoreaux*, 48 Mo. 523. Freeman in his work on Execution, section 75, in expressing his views on the question before us, says: "The general rule that none but parties to a suit will be allowed to interfere with its management, is equally applicable to the writ of execution which may be issued at the termination of the action. None but the parties to the writ, who are liable to be injured by it, can com-

plain of irregularities with which it may be affected. Hence, no stranger to the action can obtain an order quashing the execution."

To permit assignors, after having transferred their entire interests in the claims, to control the conduct of the suit, would not only be against the plain intent of our code, but would involve a case in collateral issues irreconcilable, and the parties and the court in confusion inextricable. If parties wish to transfer or assign their claims or rights of action to another for convenience, economy or what not, they must understand that with the assignment goes their right to control or interfere with suits that may be brought thereon. If parties wish to control suits begun upon accounts in their favor, they must retain control of their accounts.

As the court would have no right in the first instance, to force one to whom an account had been assigned, without reward or hope thereof from the assignor, to assume the responsibility of its collection by suit, it equally is wanting in authority to force against one's will the continuance of the undertaking voluntarily assumed to collect by suit an assigned account or accounts, which for reasons of prudence the assignee might conclude to abandon, and for a still greater reason would the court be wanting in authority to force an assignee to continue a suit on an assigned account in his own name when the assignee, as in this case, protests that he never caused the suit to be instituted in the first instance. The record in this case shows that the assignee never in fact gave his consent that this suit might be begun in his name, but only that he had been selected by the depositors of the defendant bank, as the one to whom the accounts should be assigned, and that he did consent that the suit which was originally instituted in his name in Davies County might be brought, and in which suit he was afterwards compelled to take a nonsuit, and which resulted in the costs above mentioned being taxed against him. This suit was begun apparently upon the assumption on the part of the attorneys for the assignor, that as the plaintiff Gay had consented to begin one suit upon the assigned accounts (which suit he was compelled to abandon on account of unfavorable conditions arising in its progress), he certainly would sanction another suit to be maintained upon the accounts in his name, in Grundy county, where the unfavorable conditions that lead to his taking the

nonsuit in the first instance did not exist. We have carefully examined the authorities cited by the able counsel for the respondents wherein the courts have, to avoid a failure of justice, permitted suits to be prosecuted or continued in the name of the real party in interest, after the original party or parties thereto have lost all interest therein, but they do not apply to the conditions of this case where the real party in interest had asked the case to be dismissed. The judgment will therefore be reversed and the cause remanded to the circuit court with directions to dismiss the suit in pursuance with the stipulation entered into between the defendants and the plaintiff Gay. All concur.

RAVENEL v. INGRAM.

131 N. C., 549. [1902.]

FURCHES, C. J. This is an action for breach of covenants contained in three deeds made by John Ingram, the defendant's testator,—one contained in a deed to T. J. Corbin, one in a deed to D. N. Evitt, and one in a deed to H. E. Gibson. The plaintiff is a subsequent purchaser of the land mentioned in the two first named deeds, which he holds under deeds without warranty. * * *

This disposes of the action so far as the first two warranties are concerned. But the plaintiff includes in his action a claim for damages on account of a breach of warranty in the deed to Gibson. This he cannot maintain, whatever rights Gibson may have. The plaintiff does not claim to have a deed for this tract, but bases his action and claim to recover on the following contract: "Highlands, N. C., 3d Feb., 1898. I, H. E. Gibson, covenant and agree that, if the suit brought against me by Henry Stewart should be decided against me, that I will grant and will assign to S. P. Ravenel, Jr., my right to sue John Ingram on the covenant of warranty contained in the deed of conveyance from him to me; provided, however, that S. P. Ravenel, Jr., will pay over the surplus recovered from John Ingram to me, after repaying himself the amount he shall have to expend in the defense of said suit, and the \$10 paid me this day. Witness my hand and seal this 3d day of February, 1898. H. E. Gibson. (Seal.)" The plaintiff does not claim to be the owner

of this tract of land, and Gibson could not assign the covenant of warranty without assigning the land. The warranty is a covenant real, and runs with the land (the estate), and cannot be assigned or separated from it. *Markland v. Crump, supra* (18 N. C. 94). But this deed also contains a covenant of seisin, which is a personal covenant, and does not run with the land, and was broken when the deed was made, if the grantor, Ingram, did not then have the title. *Pears Law Lect.* 185. But this agreement does not convey this chose to the plaintiff, if it could be conveyed, but only says if Stewart succeeds in his suit he will give the plaintiff a right to bring a suit on it, upon condition that the plaintiff will pay him all he recovers, except the cost of the action and \$10 the plaintiff paid him that day. So the plaintiff was to get nothing out of the suit, except the pleasure of having a law suit with the defendant. It is clearly a champertous transaction of the first water, and is void. *Barnes v. Strong*, 54 N. C. 100; *Munday v. Whissenhunt*, 90 N. C. 458. Besides, the statute requires the action to be brought in the name of the true owner or party interest. Code § 177. And so the plaintiff could not maintain this action, even were it not champertous; but as the contract under which he brought the suit is champertous and void, he certainly cannot do so.

For the reasons we have stated, the plaintiff cannot succeed in this action, and the judgment of the court below is affirmed.

STEWART v. PRICE.*

64 Kan., 191. [1902.]

GREENE, J. The defendant in error, J. E. Price, commenced this action before a justice of the peace in Allen county against D. W. Stewart, doing business under the firm name of the People's Telephone Company, to recover on two causes of action. The first was on an account due from Stewart to himself. The second was on an account due from Stewart to Mrs. A. Thompson. The latter account was itemized, verified, and assigned in writing to Price. The assignment was regular and admitted. To this second cause of action the plaintiff in error answered that Price was not the owner of the account, and therefore not the real party in interest. There was no defense

to the account; nor was there any claim that it had been assigned for the purpose of acquiring or giving the court jurisdiction over the defendant, when it otherwise could not have acquired such jurisdiction. The Thompson account was assigned to Price that he might join it with his own in an action he contemplated bringing against Stewart, and when collected he was to pay Mrs. Thompson the entire proceeds thereof. Mrs. Thompson testified that all money due on said account belonged to her; that Stewart did not owe her anything; that it was due from Price. The plaintiff in error demurred to the evidence as to the second cause of action on the ground that it showed the plaintiff was not the owner of the account, and therefore not the real party in interest. The demurrer was overruled, and judgment rendered in favor of Price on both causes of action.

The only question presented for our consideration is whether Price could maintain this action in his own name on the second cause of action. Can the assignee of a verified itemized account, assigned in writing, where the assignment is regular and admitted, maintain an action thereon in his own name, when by a previous arrangement he had agreed to pay the proceeds collected to his assignor? Our Code (section 26) provides, "Every action must be prosecuted in the name of the real party in interest except as otherwise provided in section 28." It is not contended by either party that the case falls within any of the exceptions. It must therefore be considered solely with reference to the meaning of section 26. In examining this section it will be observed that it does not say that it is the person in whose name the right of action stands, or the person who holds the legal title thereof, that may prosecute the action, but that "every action must be prosecuted in the name of the real party in interest." If Price failed to recover against Stewart, he would not be liable to Mrs. Thompson. The loss would be wholly that of Mrs. Thompson. Is the real party in interest the person who is to be benefited or who sustains a loss by the result, or is it the person who holds the legal title to the thing in action? This section is plain and unambiguous, and seems incapable of misunderstanding. By its terms it excludes the idea that any person other than the one benefited or injured by the result of the litigation can be intended. To hold otherwise would appear to be doing violence to language. This question

was before the supreme court of Indiana as early as 1858, in the case of *Swift v. Ellsworth*, 10 Ind., 205, 71 Am. Dec., 315, where it was ruled that the assignee of a promissory note, who was not entitled to the proceeds when collected, was not the real party in interest, and could not maintain an action thereon. Again, in *Bostwick v. Bryant*, 113 Ind., 448, 459 (16 N. E. 378, 383), where the answer pleaded that the note sued on was transferred and assigned to plaintiff by Anna S. Bloomer, the owner, without a consideration, and solely for the purpose of suing on and collecting the same for the use and benefit of the real owner, the same court says: "The answer shows clearly that Anna S. Bloomer is the owner of the note, and the real party in interest. The plain provisions of the statute cannot be avoided. The plea must be held good." Without exception, this is the settled rule of interpretation of this provision of our Code in Indiana. The same rule has been followed in Nebraska in the case of *Mills v. Murry*, 1 Neb., 327, and reaffirmed in the case of *Hoagland v. Van Etten*, 22 Neb., 681, 684 (35 N. W. 869, 870), in which case the chief justice says: "If a party having no interest in the subject-matter of the suit, who holds simply as assignee, and is to deliver to his assignor the proceeds of the action, may maintain an action on such an assignment, then section 29 has no meaning whatever. We do not care to enter into a discussion of the propriety or impropriety of requiring actions to be brought in the name of the real party in interest. The statute contains a plain provision, which this court has no authority to disregard. We hold, therefore, that an assignee having no interest in the result of the suit, and not entitled to any portion of the proceeds thereof, is not entitled under section 29 to maintain an action as the real party in interest." This same case was again before the court on a motion for a rehearing, and upon reargument the court adhered to its former decision. 23 Neb., 462 (36 N. W. 755). Perhaps the fullest and most able presentation of this question, while not the law of that state, is found in *Eaton v. Alger*, 57 Barb., 179, 189. Plea by the defendant that the plaintiff was not the owner of the note, and not the real party in interest. The court says: "It would, therefore, seem very clear that a defendant, on such an issue made by the pleadings, would have the right to show that the plaintiff was not the real party in interest, particularly if he had pleaded a defense in the action good as against such

pretended real party. The plaintiffs, however, insist that, notwithstanding this provision of the code (section 111), the indorsee of a note, or the holder of a note payable to bearer or indorser in blank, may maintain an action upon it, although not in fact the owner, nor, as between himself and the owner, entitled to the proceeds when collected. That such was the rule before the code is conceded, and the argument is that it was abolished by the code; that the codifiers and legislature so intended. In their report to the legislature the codifiers said: 'The rules respecting parties in the courts of law differ from those in the courts of equity. The blending of the jurisdiction makes it necessary to revise those rules to some extent. In doing so, we have had a threefold purpose in view: (1) To do away with the artificial distinctions existing in the courts of law, and to require the real party in interest to appear in court as such; (2) to require the presence of such parties as are necessary to make an end to the controversy; and (3) to allow otherwise great latitude in respect to the number of parties who may be brought in. * * * The true rule undoubtedly is that which prevails in the courts of equity—that he who has the right is the person to pursue the remedy. We have adopted that rule.' This section (now 111) was adopted by the legislature precisely as submitted by the codifiers, showing that they approved the reasons given by the codifiers for its adoption. It is, therefore, quite immaterial what was the rule previous to the code, if thereby the legislature intended to and did change the rule by express enactment. That they did so we think clear, from the language of the statute and the reasons for its adoption. In their reasoning the codifiers alluded to the existing rules and the necessity for a revision; one purpose of the proposed change being to require the real person in interest to appear in court as such, followed by an act providing that 'every action must be prosecuted in the name of the real party in interest.' This reasoning and this enactment seem too plain for misconception. The act is emphatic. It uses the Saxon word 'must' (a verb which has not yet been twisted by judicial construction, like the words 'may' and 'shall,' into meaning something else) to place beyond doubt or cavil what it intended." We heartily coincide with the reasoning and in the conclusion reached in the foregoing cases. We believe this is the true meaning of this section, as applied to actions on assigned accounts,

and so obviously plain as to admit of no other interpretation or construction. Therefore the decision of *Krapp v. Eldridge*, 33 Kan., 106 (5 Pac. 372), in so far as it expresses a doctrine contrary hereto, is overruled.

This cause is reversed and remanded, with instructions to sustain the demurrer to the evidence of the plaintiff to the second cause of action.*

McARTHUR v. GREEN BAY CANAL CO.

34 Wis., 139. [1874.]

While a tug-boat was towing the plaintiff's barge through the defendant's canal, a part of the embankment washed out, causing the barge to run aground and the tug-boat to be detained.

The owner of the tug assigned his right of action to the plaintiff, who brought a suit to recover damages for the injuries to the barge and the detention of the tug. After the affirmance of a judgment in favor of the plaintiff, the defendant filed a motion for a rehearing.

(On the motion for a rehearing.)

LYON, J.: We have carefully considered the very earnest argument of the learned counsel for the defendant in support of the motion for a rehearing, and have endeavored fully to review the grounds of our former decision of the case, but we are entirely unable to perceive anything in the case which forces upon us the alternative of receding from our former views and reversing the judgment of the circuit court, or giving up (to use the language of the learned counsel, and their italics also), "the pretense of administering *impartial* justice." Neither does our re-examination of the case lead us to believe, or even suspect, that we have attempted to evade any difficulty in the way of an affirmance of such judgment. We thought when the former decision was announced, and still think that the opinion heretofore filed, fairly stated and discussed the material questions raised on the original argument of the case, and that the principles which controlled our decision were sound legal principles, and properly applicable to the case. Entertaining

*Concurring opinions of Foster and Pollock, J.J., and dissenting opinion of Greene, J., omitted.

these views, we do not see any necessity for further discussion of the same questions.

The question whether the claim for damages for the detention of the tug is assignable, so that the plaintiff, who is the assignee of such claim, may entertain an action thereon in his own name, has not been determined, for reasons stated in the former opinion. The learned counsel for the defendant now inform us that they did not intend to waive their objection to the right of the plaintiff to recover such damages, and call upon us to determine the question on this motion; but, unfortunately for us, they have not favored us with any argument or citation of authorities on the question. Still it is our duty to determine it.

The action is to recover damages for injuries to personal property, caused by the negligence of the defendant. It does not arise out of a contract, but sounds in tort. Beyond all question, a right of action for injuries to, or the conversion of, personal property, while not assignable at the common law, is assignable in equity, unless that quality is taken away by sec. 12, ch. 122, R. S., which is as follows: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section fourteen; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract." (Tay. Stats., 1418, § 12.) The exception mentioned has no relation to this action. The above provision is contained in the New York code of procedure; and it has been held by the courts of that state in several cases that the last clause of the section does not prohibit the assignment of a thing in action which was assignable in equity before the code was enacted, but only relates to or precludes the assignment of those choses in action for personal torts which die with the party and which never were assignable either in law or in equity. Hence those cases hold that the assignee of a thing in action not arising out of a contract may maintain an action thereon in his own name, in all cases where the cause of action is assignable in equity. Some of the cases hold, or strongly intimate, that survivorship is the test of assignability—that is to say, that every chose in action which survives to the personal representative of the party, is assignable in equity, and may be sued upon in the name of the assignee. But whether this be the true test or not, we think the New York courts have given the

statute a sound interpretation in respect to the assignability of claims for damages for injuries to property.

The following are some of the authorities which sustain the principles above quoted: *The People ex rel Stanton v. Tioga C. P.*, 19 Wend. 73; *McKee v. Judd*, 12 N. Y., 622; *Waldron v. Willard*, 17 id., 466; *Merril v. Grinnell*, 30 id., 594; *Fulton Fire Ins. Co. v. Baldwin*, 37 id., 648; *Butler v. N. Y. & Erie R. R. Co.*, 22 Barb., 110; *Dinunny v. Fay*, 38 id., 18; 1 *Chitty's Pl.*, 69. These authorities are cited in the brief of counsel for the plaintiff. See also R. S., ch. 135, sec. 2, as to survival of actions, and *Noonan v. Orton*, decided at the present term.

It must be held that the action to recover damages for the detention of the tug was properly brought in the name of the plaintiff.

*Motion denied.**

Section 2. Joinder of Plaintiffs.

CODE PROVISIONS. "All persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly prescribed in this act."—*N. Y. Code Civ. Proc.*, § 446.

"Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, except as otherwise expressly prescribed in this act. But if the consent of any one, who ought to be joined as a plaintiff, cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. And where the question is one of a common or general interest of many persons, or where the persons, who might be made parties, are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."—*N. Y. Code Civ. Proc.*, § 448.

"All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this article."—*Mo. R. S. 1899, Sec. 542.*

"Parties who are united in interests must be joined as plaintiffs or defendants; but if the consent of any one who should

*See also *Snyder v. Ry.*, 86 Mo., 615.

be joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the petition. This section shall apply to both actions at law and suits in equity."
—*Mo. R. S. 1899, Sec. 544.*

(a) *Parties Who May Join.*

GATES v. BOOMER.

17 Wis., 470. [1863.]

By the Court, COLE, J.: The first objection taken to the complaint on the demurrer is, that the court has no jurisdiction of the cause. The complaint is filed by two judgment creditors of Lyman E. Boomer, for the purpose of setting aside and having declared void a deed given to him by his co-defendant, on the ground that it is fraudulent and void as to creditors. They state that their judgments were obtained subsequent to the giving of said deed; that executions have been issued upon them, and returned unsatisfied; and that the judgment debtor has left the state and has no property here liable to seizure and sale. They therefore ask that the deed, which is an obstruction, be removed so that they can enforce their liens by a sale of the property upon execution. This general statement will suffice to understand the object of the suit.

We think the facts stated in the complaint bring the case within an acknowledged head of equity jurisdiction. As already observed, the object and purpose of the suit is to clear the real estate of the judgment debtor from an incumbrance fraudulently and improperly placed upon it to the injury and prejudice of the creditors. It is said, if the deed be void in respect to creditors, as is alleged, that then this suit is unnecessary, since there is no obstacle to the respondents enforcing their judgments by sales upon execution. But if the parties should adopt the course suggested, still it is very obvious that the existence of the deed would throw doubt and uncertainty upon the title and might prevent bidding entirely at the sales.

It is further objected that there is a defect of parties plaintiffs, and that it was irregular for the two judgment creditors to unite in the action. This point is clearly untenable. Both plaintiffs have a common interest in removing the fraudulent conveyance, so that they can enforce their respective judgments.

relief, allowed the parties to join just as a court of equity would have done before the Act on the ground of convenience. But such ground would be sufficient for allowing some

Judgment creditors seek to have fraudulent deed set aside by him in equity

Each man had a separate & distinct right of action to enforce the constructive trust; but both were interested in having the deed set aside. One sue from would see both cases & the court, granting equity

And aside from our statute we think there would have been no misjoinder of parties plaintiffs. See case in 3 Paige, supra, (Clarkson v. Depeyster, 3 Paige, 320), and authorities there referred to. But our statute provides that all persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, with certain exceptions not applying to this case. Sec. 18, ch. 122. This provision is unquestionably broad enough to meet the case at bar, since both plaintiffs have a direct and common interest in the subject matter of the suit and in the relief sought. The third objection, to-wit, that several causes of action are improperly united in the complaint, is disposed of in considering the question whether or not there was an improper joinder of the parties plaintiffs.

The next objection, that the several causes of action are not separately stated, is not sustained by the complaint, as an examination of its various allegations will abundantly show. * * *

Judgment affirmed.

for claim

GRAY v. ROTHSCHILD.

112 N. Y., 668. [1889.]

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Action by Bryce Gray and others against Maier Rothschild and others. Plaintiffs consist of seven different firms, who severally, at different times, sold goods to defendants Charles M. and Jacob M. Rothschild, partners, composing the firm of Charles M. Rothschild & Co., and they allege that the goods were obtained by means of false representations, and that the purchasers, together with the two other defendants, Maier and Abraham Rothschild, entered into a conspiracy by which these goods and others were to be purchased on credit, and Charles M. Rothschild & Co. were to defraud the sellers of the prices by removing, secreting, and disposing of the goods, and that such conspiracy was carried into execution. The action was for the recovery of damages amounting to the aggregate sum owing for such goods to the several plaintiff firms.

In the action by John T. Sherman and others against the same defendants the complaint is substantially the same, except that plaintiffs obtained judgments by confession from

Charles M. and Jacob M. Rothschild, and then commenced this common action for damages sustained by the sale and delivery of goods to Charles M. Rothschild & Co. Fourteen different sales are alleged in the complaint, upon each of which the purchasers confessed judgments to the respective sellers, who consist of eleven firms and three individuals.

Demurrers to the complaint for misjoinder of parties plaintiff, and for improperly uniting causes of action, were sustained by the special and general terms, and plaintiffs in each case appeal.

DANFORTH, J.: It may very well be that each plaintiff has a good cause of action against the defendants, but the plaintiffs have none common to all, or jointly with each other. Each individual and each firm may have been defrauded by similar, although not the same, representations; but the complaint shows that each has suffered separately, and its whole scope and meaning is inconsistent with the idea that the plaintiffs, or any two or more of them, are jointly prejudiced. As the objection appears upon the face of the complaint, the demurrer was well taken.

The judgment should be affirmed.*

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YOUNKIN v. MILWAUKEE TRACTION COMPANY.

112 Wis., 15. [1901.]

Action by Younkin and others, abutting property owners, against the Milwaukee Traction Company to restrain the operations of a double track street car line and for damages to the property. On appeal by defendant from an order overruling its demurrer to complaint.

CASSODAY, C. J.: There can be no question but what, in the absence of any statute for condemnation, the abutting owners in such a case may resort to the ordinary actions at law or in equity. Davis v. Railroad Company, 12 Wis., 16; Ford v. Railroad Company, 14 Wis., 609; 80 Am. Dec., 791; Powers v. Bears, 12 Wis., 214, 78 Am. Dec., 733; Shepherdson v. R. R. Co., 6 Wis., 605. The principal object of this action is to abate

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against the
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intended; (2)
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ages (legis-
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*Levering v. Schnell, 78 Mo., 167, accord.

such nuisance, common to all the plaintiffs, and to restrain the defendant from further erecting any such obstructions upon, or in any manner interfering with, the lands of the plaintiffs or any of them. It is well settled in this state that "where the erection of a nuisance will cause private and special damage to each of several persons, they have a common right to prevent its erection, and may join as complainants in a bill for that purpose, or to abate it after it is erected." *Barnes v. City of Racine*, 4 Wis., 454; *Pettibone v. Hamilton*, 40 Wis., 415, 416; *Kaukauna Water Power Company v. Green Bay & Milwaukee Canal Company*, 75 Wis., 385, 392 (44 N. W. 638); *Grand Rapids Water Power Company v. Bensley*, 75 Wis., 399, 402, 403 (44 N. W. 640; *Linden Land Co. v. Milwaukee Electric R. R. & Light Co.*, 107 Wis., 507, 508 (83 N. W. 851). To the same effect are the decisions in other states. *Reid v. Gifford*, 1 Hopk., Ch. 416; *Murray v. Hay*, 1 Barb., Ch. 59, 43 Am. Dec. 773; *Id.*, 4 Sandf., Ch. 362; *Brady v. Weeks*, 3 Barb., 157; *Strobel v. Salt Co.*, 164 N. Y., 323 (58 N. E. 142), 51 L. R. A. 687, 79 Am. St. Rep. 643; *Rowbotham v. Jones*, 47 N. J. Eq. 337 (20 Atl. 731); 19 L. R. A. 663. Thus, in the last case cited, it is held that "a nuisance is common to several complainants, when it affects all of them, not precisely at the same instant and in the same degree, but at the same period of time and in a similar way, so that the same relief may be had in the suit, whether there be one, two, or a dozen plaintiffs." Had the defendant turned a stream of water upon Lincoln avenue, so as to flow along the same, and over the lands of the respective plaintiffs as abutting owners thereon, there would be no question about the right of the plaintiffs to join in an action to restrain such use of the street and to abate such nuisance. The construction of the railway in the manner described is equally unlawful. In the Telephone case, this court recently held that "the erection and maintenance of a telephone pole in the street in front of the show window of a store building, interfering with the proper use and enjoyment of the property, is a continuing trespass upon the land, and a nuisance, which a court of equity will abate." *Krueger v. Telephone Co.*, 106 Wis., 97 (81 N. W. 1041, 50 L. R. A. 298). We must hold that the plaintiffs have a common right of action, and that the complaint states facts sufficient to constitute a good cause of action for such injunction and to abate such nuisance.

Here the trespass was on the street; but if it had been a case of trespasses over private property, these parties could not have joined, even in equity.

The other ground of demurrer is that several causes of action have been improperly united. As indicated, the respective plaintiffs own 29 different lots in severalty, abutting on Lincoln avenue. One has a frontage of only 38 feet and four inches, and another of 157 feet and four inches, and the others ranging between. The complaint alleges that the plaintiffs have already sustained damages in the sum of \$5,000, and demands judgment in favor of the plaintiffs, for that amount for past damages. Obviously the amount of the damages to the respective lots must differ more or less, depending upon the amount of frontage, the location, surface, and the nature of the ground, etc. To ascertain such damages with any degree of certainty would necessarily require a separate trial as to several, if not all, of the lots in question. In one of the cases in this court, brought by several plaintiffs to restrain the diversion of water, cited above, it was contended that several causes of action were improperly united. Grand Rapids Water Power Company v. Bensley, 75 Wis., 401 (44 N. W. 641). Mr. Justice Taylor, speaking for the court in that case, said: "It is clear there would be a misjoinder of causes of action if the plaintiffs sought any relief for the mere injury to the soil and freehold of the plaintiff, the Grand Rapids Water Power Company. No such relief is, however, sought by the plaintiffs or prayed for by them in the complaint. * * * The only relief prayed for is a perpetual injunction restraining the defendant from diverting the water of said river from its accustomed flow to the plaintiff's mills and water powers. No damages are claimed for the injury done to the soil and freehold of the Grand Rapids Water Power Company. There is, therefore, no improper joinder of causes of action." It is stated by a distinguished author on such subjects that "where several persons are injured by a common nuisance, although varying in degree, but having a common effect, they may join in a bill for an injunction, but there can be no recovery of damages." 2 Wood, Nuis. (3d ed.) p. 1160, § 791. As the result of an able opinion by Chancellor Walworth in one of the cases cited and followed by Chief Justice Whiton in Barnes v. City of Racine, supra, it was held that "there is no inflexible rule as to joinder of parties in the court of chancery. Yet, as a general principle, several complainants, having distinct and independent claims to relief against a defendant, cannot join in a suit for the sepa-

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rate relief of each.) Nor can a single complainant, having distinct and independent claims to relief against two or more defendants severally, join them in the same bill. But there are many exceptions to this rule, and the court exercises a sound discretion in determining whether there is a misjoinder of parties under the particular circumstances of each case." *Murray v. Hay*, 1 Barb., Ch. 59, 43 Am. Dec. 773. In that case past damages to the respective complainants by reason of the alleged nuisance was prayed, and objection to the bill was made on that ground and sustained. The court refused to allow the bill to be amended by striking out the name of one of the complainants, but allowing it to be amended by striking out the claim for such damages. Page 65, 1 Barb. Ch., and page 77, 43 Am. Dec. The same rule has been sanctioned in more recent cases in that state. *Brady v. Weeks*, 3 Barb., 157, 160; *Lynch v. R. R. Co.*, 129 N. Y., 286 (29 N. E. 315), 15 L. R. A. 287, 26 Am. St. Rep. 523. The same rule is sanctioned in a long line of cases in New Jersey, in the first of which it was held that "the court will not permit several plaintiffs to demand by one bill several matters perfectly distinct and unconnected against one defendant, nor one plaintiff to demand several matters of distinct natures against several defendants" *Marselis v. Banking Company*, 1 N. J. Eq. 31; *Davidson v. Isham*, 9 N. J. Eq. 186; *Hinchman v. R. R. Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; *R. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Demarest v. Hardham*, 34 N. J. Eq. 469; *Rowbotham v. Jones*, *supra*. Several of these cases are street railway cases. We must hold that the second ground of demurrer was improperly overruled.

The order of the circuit court is reversed, and the cause is remanded with directions to overrule the first ground of demurrer, and sustain the second ground of demurrer, and for further proceedings according to law.

*for plain- in-
junction but no damages.*

BORT v. YAW.

46 Ia., 323. [1877.]

These plaintiffs allege that they bought of the defendant two promissory notes, one for the sum of \$240.00, executed by James Evart, and one for \$51.97, executed by Eden R. Latta; that the defendant, willfully and fraudulently to cheat and de-

fraud plaintiffs, represented that the makers of the notes were perfectly responsible; that the representations were false, the makers at the time being insolvent; that plaintiffs, by reason of said false representations, were induced to purchase the notes. A writ of attachment was sued out and levied upon the property of defendant. The evidence being introduced, the court upon motion of defendant dissolved the attachment, for the reason that no order therefor was made by a judge of court. The court also, on motion, dismissed the cause, for the reason that there is a misjoinder of parties plaintiff. The court, thereupon, rendered judgment against plaintiffs for costs. The plaintiffs appeal.

DAY, Ch. J.: The evidence shows the following facts: At the time of the transaction complained of Yaw owed Baldwin for a couple of colts, and was negotiating for the purchase of a colt from Baldwin and also for the purchase of one from the plaintiff Bort. He proposed to turn over the Evert note for the colts and what he owed Baldwin. Whilst the negotiation was pending, Bort proposed to sell to defendant a piano for \$200, and defendant offered him the balance of the Evert note, the Latta note, and his own note for \$91.00. This proposition was accepted. The plaintiff, Baldwin, for his colt and what defendant already owed him, obtained a part interest in the Evert note. The plaintiff, Bort, for his colt and piano, obtained the balance of the Evert note, the Latta note, and the note of defendant. The trades were made at the same time, but they were wholly distinct. Bort had no interest in Baldwin's trade and Baldwin had no interest in Bort's trade.

It was during these trades that the false and fraudulent representations complained of, as to the solvency of the makers of the notes, were made.

This action, it must be observed, is not brought upon either of the notes, but is brought to recover damages sustained by the fraudulent representations, whereby plaintiffs were induced to part with their property. There is no pretense that either plaintiff had any interest in the property of the other. The false representations gave each a right to an action for the damages he sustained, but did not give them any right to maintain a joint action. The damages were just as distinct as those arising from slanderous words, at the same time spoken of two persons. See *Hinkle v. Davenport*, 38 Iowa, 355. We

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have here the union of two separate and distinct causes of action existing in favor of distinct parties, neither having any interest in the cause of the other. It is claimed that under sections 2649, 2650 of the Code the objection, not having been taken by either demurrer or answer, is waived. But this is not a case of defect of parties, as contemplated in section 2648, but a misjoinder of parties. An amendment might have been made by striking out the name of one of the parties, or dismissing the cause of action as to one. *Hinkle v. Davenport*, *supra*. But this was not done, and both parties stood before the court asking judgment. In *Cogswell v. Murphy*, p. 44, *ante*, it was held that judgments could not be rendered against three defendants, for damages done by their cattle, the proof showing that each defendant owned some of the cattle, and that none of them were jointly owned by the defendants. That was a case in which separate actions should have been brought against the defendants; this is one in which separate actions should have been brought by the plaintiffs. The principle involved is the same. The court did not err in sustaining the motion to dismiss the cause. The cause being properly dismissed, the ruling upon the motion to dismiss the attachment becomes immaterial, and it is not necessary to review it.

Affirmed.

for def.

✓ **JEFFERS v. FORBES.**

28 Kan., 174. [1882.]

Action brought by Jeffers and thirteen others against Forbes and another, to set aside certain deeds. At the September term, 1881, the court sustained a demurrer to plaintiff's petition, to which ruling they excepted, and have brought the case here for review.

BREWER, J.: The plaintiffs in error (plaintiffs below) were respectively the widow and children of A. R. Jeffers, deceased, and filed their petition in the district court of Doniphan county, seeking to set aside six several deeds executed by themselves separately to the defendant, W. H. Forbes, and also a subsequent deed from W. H. Forbes to his co-defendant, B. N. Forbes. The deeds from the plaintiffs were, respectively, a deed from the widow, four separate deeds from the adult chil-

dren, and a guardian's deed from the widow as guardian for the minor children. These deeds were executed at different dates and places, and all taken together conveyed a full title to the land described therein. To the petition defendants demurred on the ground that several causes of action were improperly joined, and also that the petition did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiffs now bring the question here for re-examination. The facts as disclosed in the petition are briefly as follows: On October 1, 1875, A. R. Jeffers was the owner in fee-simple of a tract of about 310 acres in Doniphan county, Kansas, and on that day he and his wife executed a mortgage to the Phoenix Insurance Company to secure the payment of \$3,300, with interest at 10 per cent. They also executed a second mortgage on the land to the defendant, W. H. Forbes, for \$428. In August, 1878, A. R. Jeffers died intestate, his death being sudden and from accident, while away from home, leaving the plaintiffs as his heirs, and also leaving personal property more than enough to pay and discharge all debts against the estate, as well as all expenses of administration. Besides the above property he was also the owner at the time of his death of an unimproved tract of forty acres in Doniphan county, worth \$10 per acre. Interest had been paid on the insurance company's mortgage up to April 1, 1878. The mortgaged tract had been occupied by A. R. Jeffers and his family for several years as a homestead, and continued to be so occupied by the widow and younger children after his death until the twelfth day of March, 1879, when, by fraud, fraudulent representation, threats, and duress on the part of the defendant, W. H. Forbes, they were dispossessed by him. The mortgaged tract was worth at the time of the death of said A. R. Jeffers the sum of \$12,380, and the annual profits were \$1,500. This value continued up to the time of the execution of the deeds complained of, and was well known to the defendants.

A few weeks after the death of said A. R. Jeffers, W. H. Forbes purchased the insurance company's mortgage, representing that he was doing so as a matter of friendship for the widow and children. After obtaining possession of this mortgage, the attitude of Forbes towards the family suddenly changed. He became hostile, and demanded immediate possession of the property so mortgaged, falsely representing that the indebtedness of the estate was many thousands of dollars

more than it was two years after found to be, and that its aggregate was so great that no property, either real or personal, would be left to the widow or children. The widow being old and infirm, little versed in business matters, paralyzed, and overwhelmed with distress on account of her sudden bereavement, ignorant of her husband's real financial condition or of her rights under the law, being without means at that time to procure counsel of her own, and each and all of the children being young and unskilled in business, and fearing that defendant Forbes could and would proceed to dispossess the plaintiff and her family, and under the duress and threats of said defendant Forbes, the widow and adult children conveyed by deeds of quitclaim their interest in the mortgaged tract, and the widow was persuaded to become guardian of the minor children, and to institute and carry through proceedings in the probate court by which the interests of said minor children were also conveyed to said Forbes—the sole consideration above the mortgage debts received by said grantors being a tract of forty acres, costing \$350, which said Forbes caused to be conveyed to said widow. The prayer of the petition was that all of said six deeds from the plaintiffs to W. H. Forbes, and that from W. H. Forbes to his brother, be canceled and declared void and of no effect; that the defendant be compelled to account for the use and occupation of the lands since March 12, 1879, and for such other and further relief as might be deemed just and equitable.

The first ground of demurrer, as heretofore stated, is that several causes of action were improperly joined; and the contention is that the setting aside of each of the six several deeds from the plaintiffs to the defendant, W. H. Forbes, was a separate and independent cause of action, in which only the grantor in such deed had any interest. On the other hand, it is insisted that the plaintiffs together were the owners of a single tract; that but a single contract and agreement was entered into between them and the defendant, W. H. Forbes; that, in pursuance of such single contract and agreement, the various interests held by the several plaintiffs were conveyed to said Forbes; that if such contract and agreement was fraudulent and void, the plaintiffs had a joint interest in having it so adjudged, and all instruments executed to carry it into effect canceled and declared null and void; and that, therefore, there was but a single cause of action, in which all the parties plain-

tiff were interested, and to enforce which they may unite in a single action.

We think the contention of the defendants in error is correct, and that the ruling of the district court must be sustained on this ground. Section 35 of the code proscribes the rule as to the joinder of parties plaintiff. It reads: "All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, except as otherwise provided in this article." Now, the title by which the plaintiffs held this tract was that of tenants in common. Each owned an individual interest, and his ownership was not affected in the slightest degree by the question as to who held the title of the other interests. Either owner might sell or refuse selling, and his right and title could not be abridged by any action of his co-tenants. Whatever may have been the wrong in the agreement, the transfer of title was effected only by these separate conveyances. The deed of the widow passed no title away from any of her children. That deed may stand or fall without in the least affecting any of the other conveyances. Suppose, for instance, an action was brought to set aside the widow's deed alone, can it be claimed for a moment that the children would be necessary or proper parties to such an action? Whatever the consideration received by the widow, whatever inducements she received for the execution, whatever threats or promises were made to her, they would have no right to challenge the deed, they would not be interested in having the deed set aside, they would have absolutely no right to take part in the litigation. This would be a matter concerning herself alone. If she had been wronged, she and she alone could bring an action to right that wrong, and, beyond question, they would be improper parties to such an action. If successful they would gain nothing; if unsuccessful they would lose nothing. The same may be said in reference to each of the other deeds. The grantors therein would be the only parties interested in having those deeds set aside. It is not enough under the section quoted that all the plaintiffs should have an interest in the subject of the action; it is essential that they should all have an interest in obtaining the relief demanded. But only the grantor in each deed is interested in obtaining the cancellation of that deed. As each grantor is alone interested in obtaining the cancellation of his own deed, and as all the other plaintiffs would be improper parties in an action brought by the one alone

to set aside his individual deed, so where all the parties unite in an action to have set aside six several deeds by separate grantors conveying separate interests, they unite six several clauses of action in one suit, and six several causes of action in each of which only a portion of the plaintiffs is interested.

This does not assimilate an action in which the possession of the land owned in common is disturbed, for there each of the owners is alike interested in the possession. Jointly interested in the possession, they may jointly sue for any disturbance of their possession. But while jointly interested in the possession, they are not jointly interested in the title. Each owns his title separate and apart from the other—owns it absolutely and alone. The fact that they take by inheritance from a common ancestor, in no manner unifies their title. They hold by the same complete, separate, and independent title as though each had purchased his interest from a different party. Nor does the case assimilate that in which by a single instrument, as a tax or other deed, a cloud is cast upon the title to the entire tract, or one in which owners of different tracts unite in a single action to abate a common nuisance. In such cases there may be said to be a unity of action, a unity in the relief demanded; either the single cloud is to be removed from the title, or the common nuisance is to be abated. But here each party's title is affected by a separate deed executed at a different time and place, and purporting to convey only his own separate interest, and the sole relief he can obtain is the cancellation of his own deed.

Again, it is not true that there was but a single contract or agreement in reference to the transfer of this land. The petition alleges that under threats, duress, etc., as above stated, the widow made her deed, and that under like threats, duress, etc., and for the sake of saving some small pittance, if they could, for their mother, the other adult plaintiffs made their deeds. So that there is, in fact, no unity either in the cause of action or in the relief demanded. In 1 Daniell's Chancery, 395, the author says: "Thus, if an estate is sold in lots to different purchasers, the purchasers cannot join in exhibiting one bill against the vendor for a specific performance; for each party's case would be distinct, and there must be a distinct bill on each contract. *Hudson v. Maddison*, 12 Sim., 416; *Coop. Eq. Pl.*, 182; *Story, Eq. Pl.*, 272, and notes." If separate vendees cannot unite in a single bill against a common vendor, neither can

separate vendors unite in a single bill against a common vendee. See, further, the following authorities from this court: Harsh v. Morgan, 1 Kan., 293; Winfield Town Co. v. Maris, 11 Kan., 147; Hudson v. Atchison Co., 12 Kan., 147; Swenson v. Plow Co., 14 Kan., 388. Also the cases of Bort v. Yaw, 46 Iowa, 323, and Tate v. Railroad Co., 10 Ind., 174, in which last case the court in the syllabus lays down the doctrine thus: "Two or more persons, having separate causes of action against the same defendant, though arising out of the same transaction, cannot unite; nor can several plaintiffs in one complaint demand several distinct matters of relief; nor can they enforce joint and separate demands against the same defendants."

We conclude, then, that upon this ground the ruling of the district court is correct, and must be affirmed.

for set. ✓

STATE EX REL. v. BEASLEY.

57 Mo. App., 570. [1894.]

GILL, J.: This is a joint action brought by James Glass, of Sedalia, and Gildenhaus, Wulfig & Co., of St. Louis, against Beasley and others, on a constable's bond, the object being to recover damages for the alleged wrongful seizure and conversion by the defendant, Beasley, as such constable, of certain personal property belonging to the plaintiffs.

In the year 1890 Watts was engaged in the conduct of a small store at Nelson, Saline county, selling drugs, groceries, etc., and became indebted to these plaintiffs and others. On Sept. 24, 1890, Watts made a chattel mortgage to Glass, covering by its terms merely the fixtures and drug bottles in the store; and thereafter on Oct. 6, executed a second chattel mortgage, in favor of the plaintiffs, Wulfig & Co. The latter mortgage not only included the fixtures (which Glass' mortgage covered), but also conveyed the entire stock in trade. Under the Wulfig mortgage, Watts was permitted to continue his business in the usual manner, nor was said mortgage ever recorded. Among the conditions of the Wulfig mortgage was one that, in case the creditors of Watts should sue him, then such conveyance should become absolute, etc.

Shortly thereafter other creditors of Watts brought their several actions, and Parmalee, an attorney of Sedalia, having

charge of Glass and Wulfig claims, went to Nelson and took possession of Watts' store, fixtures, stock and all. Whether Parmalee took such possession for and in behalf of Glass alone, or for Glass and Wulfig, is in dispute. At any rate, Watts' creditors, other than the above named mortgagees, immediately attached on their respective claims and took the goods from Parmalee, the alleged agent and attorney of Glass and Wulfig. Thereupon this suit was brought, which, on a trial by a jury, resulted in a verdict and judgment for the plaintiffs, and defendants appealed.

The judgment herein cannot be allowed to stand. There is a clear misjoinder of parties plaintiff, and the question was properly raised in the defendant's answer. The case, under the evidence (stated most strongly, too, for plaintiffs), is this: A and B, as several and independent creditors of C, each secure their several chattel mortgages on C's property. A, the prior mortgagee, has a lien on, and right of possession to, a part thereof, to-wit, the store fixtures, while B, the other creditor, secures a first lien on the stock of goods (which is not covered by B's mortgage), with a further pledge of the equity which the mortgagor C might have in the fixtures after the satisfaction of A's mortgage. These creditors now seek to avail themselves of these securities and take possession of the property. That possession must be such, and only such, as was provided by the respective mortgages. Under A's mortgage, he could only take the store fixtures, since that is the full extent of the property covered by it. And so with B (the holder of the last incumbrance); he was only authorized to take and hold for the payment of his claim the property included in his mortgage—nothing more. This was the stock of goods, and which was not included in A's mortgage. B was not entitled with A even to joint possession of the goods mentioned in A's mortgage, for A had a prior incumbrance, and B, in that regard, stood just where the mortgagor C would

Here, then, were two separate and distinct mortgagee creditors, holding each a lien right in separate and distinct personal property. All this property, we will assume, was wrongfully taken and converted by a third party. The question is, can these two mortgagees, claiming under separate instruments, which cover different property, prosecute a joint suit against the trespasser. We must hold that they cannot. While, unquestionably, the rule is, that tenants in common of a chattel

should join in an action for any injury or trespass done to their joint property (State ex rel. Johnson v. True, 25 Mo. App., 451; 1 McQuillen's Pl. & Pr., Sec. 111), it is equally true that, "where the interest affected and the damage sustained are respectively several, there must be separate actions at the suit of the parties injured." Barb. on Parties (2nd Ed.), 267.

The wisdom of this rule is quite manifest in the case at bar. It may be that Glass, under his mortgage, should be entitled to the property so conveyed to secure his claim; while, on the other hand, it might be that Wulfin & Co.'s mortgage was invalid, because not recorded nor possession thereunder taken before other creditors attached. The cases, therefore, are not only technically separate and distinct controversies, but the merits or demerits of each are wholly different.

The judgment is reversed and the cause remanded with directions to dismiss. All concur.

for def.

TROMPEN v. YATES.

66 Neb., 525. [1902.]

HASTINGS, C.: This was an action brought by the defendants in error jointly, claiming damages for the conversion by plaintiff in error, as sheriff, of certain goods. February 18, 1897, Frances E. Price gave a chattel mortgage on her stock of drugs in the store at the corner of Tenth and P streets, in the city of Lincoln, Neb., for \$500, to her husband, J. W. Price. The same day she also executed a chattel mortgage on the same drugs to J. R. Nichols for \$100, for services as a clerk in the store; also to Chas. Yates for \$40, for services in the store; also to J. D. Johnson for \$25, for grocery bill; also to Victor Weiler for \$20, borrowed money; also to W. L. Garten for \$30, borrowed money; also to C. M. Seitz for \$20, grocery bill; and also to F. J. Kelley for \$350. Of this amount \$266 was claimed to be due for past services, \$40 for borrowed money, and the remainder for contemplated services in upholding the transfers; but on this indebtedness to Kelley was to be credited \$90.15, store account. A mortgage was also made to the Lincoln Drug Company for \$110, and to W. E. Clarke for \$350, and to Kipp Bros. for \$110, to secure indebtedness due them. The execution and filing of the mortgages were without the knowledge of the mort-

gagees, except Price, Nichols, Weiler, and Kelley; but the action was ratified subsequently by all of the other mortgagees, who were parties to this action. The mortgages of Price, Nichols, Kelley, and Yates were all filed at 2:35 p. m.; the mortgages of Johnson, Weiler, Seitz and Garten at 2:40 p. m., and those of the Lincoln Drug Company, Clarke and Kipp Bros. at 2:45 p. m., on February 20, 1897. The mortgagee Kelley claimed to have taken possession of the stock of goods on behalf of the mortgagees immediately on the filing of the instruments, and to have placed an inscription on the front door, "Closed under Chattel Mortgage." He claims to have retained such possession until the goods were levied upon by Sheriff Trompen. The remnant of the goods left by the sheriff he claims to have sold for \$585, and with the proceeds paid \$100 to Nichols and \$485 to Price. The answer alleges a misjoinder of causes of action; a misjoinder of parties plaintiff. * * * The petition of the plaintiffs below alleged that they were in the actual possession of the goods, and that these were wrongfully taken away from their possession by the defendant sheriff. Copies of their several mortgages were attached. A motion was filed by the sheriff to require the plaintiffs to more specifically state in what manner he had taken possession of the goods; to state particularly what merchandise was taken under execution, and what under attachment. A demurrer was also filed. First, that there was a defect of parties plaintiff; and, second, that the petition did not state facts sufficient to constitute a cause of action in favor of plaintiffs. Both motion and demurrer were overruled, and the defendants then answered as above stated.

Two briefs have been filed on behalf of the plaintiff in error, in one of which the sole question argued is the alleged misjoinder of the plaintiffs. It is urged that section 40 of our Code of Civil Procedure furnishes no warrant for joining these plaintiffs, because they have no common right; that their mortgages were filed at different times, and their holding cannot be joint. The result does not seem necessarily to follow even from holding their mortgages separate and distinct liens upon the same property.

They allege a joint possession, which they say the sheriff has invaded. If, in fact, they were in the joint possession of these goods, and the sheriff wrongfully took them, it would seem to constitute a common wrong against all the tenants who were

jointly holding. Each would have a joint interest with all the others in vindicating their joint possession. Their case would seem to come distinctly within the terms as well as the spirit of section 40 of the Nebraska Code of Civil Procedure. The question seems to be argued, however, as if there has been no attempt to take possession, and the plaintiffs were simply trying in this action to vindicate a right under their several mortgages. Even if such were the case, we think, under the holding of this court in *Earle v. Burch*, 21 Neb., 710 (33 N. W., 254), and in the earlier case of *Kaufman v. Wessel*, 14 Neb., 162 (15 N. W., 219), and the approval that has been often given to both these cases, that this court is committed to the applying in law actions of the equity doctrine that interest in the subject of the action gives a right to join as plaintiff. *Earle v. Burch* certainly holds that successive mortgagees, merely as such and where possession has not been had on any of the mortgages, may join in replevying the property. If in a replevin action, why not, then, in one for conversion? A distinction is sought to be made in the nature of the relief sought, in the one case an indivisible possession of the property which is the common subject to the plaintiff's rights; in the other a lump sum of money, in which plaintiffs have separate and possibly conflicting rights. But we have section 429 of the Code, providing expressly for this situation, and apparently adopted with precisely this extension of equity ideas to law cases in view. It provides: "Judgment may be given for or against one or more of the several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. The court may also dismiss the petition with costs, in favor of one or more of the defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served." Counsel say that these several lienholders have a common interest in the possession which is the subject of the action in replevin, but none in the whole amount of damages recoverable for the conversion. But what more interest has one lienholder in the

other's possession than he has in the other's recovery of damages? The truth seems to be that the equity practice of taking into the action everybody who claims an interest in its subject-matter was the object aimed at in these Code provisions, and this court seems to have carried them out according to their letter and spirit. In *Lancaster Co. v. Rush*, 35 Neb. 119 (52 N. W. 837), the city of Lincoln was joined with the county in foreclosing a tax lien. This court says that the city need not have joined, but, as it had an interest in the sale certificate to the amount of its taxes, it properly might do so, under section 40 of the Code. Other jurisdictions have applied similar Code provisions in the same way. In *Munson v. Railway Co.* (Sup.) 65 N. Y. Supp. 848, it is held that an insurer, who has paid in part for property destroyed by the railway company's fault, can join in an action for damages. A similar case is *Railway Co. v. Miller* (Tex. Civ. App.) 66 S. W. 139. In England, in 1899, under similar statutory provisions, it was declared in *Ellis v. Bedford*, 68 Law J. Ch. 289, "All persons having a common right which is invaded by a common enemy, although they may have different rights *inter se*, are entitled to join in respect to that common right." In that case the common right was to the use of stalls in a market, and a part of the invasion was the exaction of illegal tolls for its use from the different plaintiffs. In *Railway Co. v. Haber* (Kan.) 44 Pac. 632, the joining of 145 parties in one action for damages by reason of the introduction of cattle having the splenic fever, and which communicated that disease to native cattle, was upheld. It is not thought that there was error in permitting the joint action of plaintiffs in this case. Counsel for the sheriff insist that the case of *Gray v. Rothschild*, 48 Hun, 596, 1 N. Y. Supp. 299, is entirely parallel to the one at bar, and should control it. There is, however, a very manifest distinction between the two cases. The New York case was brought by creditors who had sold goods to the defendants. These goods were made away with fraudulently. The creditors joined in an action for their value. It was held that it could not be maintained. The right of each plaintiff went, not to the whole goods, but only to the part of them bought from himself. In the present case such right as each mortgagee had went to the entire lot of goods. Where to this is added joint possession, the right to recover jointly for their taking seems complete.

Judgment affirmed.

for plain.

SWARTHOUT V. C. & N. W. R. R. CO.

49 Wis. 628. [1880.]

COLE, J. This action is brought by the plaintiffs to recover of the defendant company the damages caused by the burning of the plaintiff Swarthout's property through the negligence of the defendant. The property destroyed is alleged to have been of the value of \$6,727. The plaintiff insurance companies were insurers of the property to the extent of \$1,000 each. After the fire the insurance companies paid Swarthout the amount of their respective policies, and at the same time Swarthout made and delivered to each an instrument in writing assigning and setting over to each insurance company his claim against the railroad company to the extent of \$1,000, and subrogating each insurance company to his rights for that amount. Judgment is demanded for the value of the property destroyed.

action by the insured (Swarthout) & the insurance companies against the R.R. Co. who caused the destruction of the insured property.

The defendant demurred to the complaint on the ground that it appeared from the face thereof—*First*, that there is a defect of parties plaintiff herein in this, that on the facts alleged the plaintiffs do not have any joint claim or cause of action against the defendant; if any claim or cause of action is set forth in said complaint as to any or all of said plaintiffs, such claim or cause of action as to each plaintiff is separate and distinct from the claim or cause of action of each of the other plaintiffs, and to each such several causes of action all the other plaintiffs aforesaid than the one to which the same respectively belongs are unnecessary and superfluous; and are improperly joined as plaintiffs herein; *second*, that several causes of action have been improperly united; *third*, that the complaint does not state facts sufficient to constitute a cause of action. The demurrer to the complaint was overruled, and the correctness of that ruling is the matter to be decided upon this appeal.

The learned counsel for the defendant, in support of the demurrer, candidly admitted the law to be well established that an insurance company which has been compelled to pay, or has paid, a loss covered by its policy, has, after such payment, a right of action against the person who wrongfully caused the fire and loss to the amount such insurance company paid, even without any formal assignment by the assured of his claim against the party primarily liable. An examination of the authorities will show that this admission was not improvidently

made. And the courts have likewise been very firm in supporting the right of the insurance company to bring an action in the name of the assured, and will not allow the latter to defeat such action even by a release or discharge of the person by whose act the damage was occasioned. *Hart et al. v. Western R. R. Co.*, 13 Metc. 99; *Monmouth County Fire Insurance Company v. Huehinson et al.*, 21 N. J. Eq. 107; *Conn. Fire Insurance Company v. Railway Company*, 73 N. Y. 399. These authorities distinctly affirm this position on the ground that the assured, by accepting payment of the insurer, subrogates the latter to his rights, giving such insurer full authority to sue the party causing the loss in his name.

But it is insisted that the facts stated show that the plaintiffs have no right to join in bringing the suit, and that there is an improper joinder of causes of action. It is said that if the defendant is liable at all it is separately and distinctly liable to each insurance company to the amount paid on its policy. But it seems to us it would be an intolerable rule to allow each insurance company to bring a separate suit. The railroad company might well say, were this attempted, the claim is indivisible; there is but one wrongful act complained of, one loss and one liability. It might well insist that the whole matter should be litigated in one action. And what objection there can be to allowing the owner to unite with the insurance companies in bringing one action to determine the liability of the defendant we fail to perceive. Under the old practice the action would probably have been brought in the name of the assured for the benefit of all concerned, but the code requires the action to be brought in the name of the real party in interest. Now it appears Swarthout has made an assignment in writing to each insurance company of a part of his claim against the railroad company for the alleged wrongful destruction of his property.

It is obvious if one of the insurance companies may bring a separate suit for the amount of its claim each may, and as the aggregate amount of the policies falls short of the actual loss, Swarthout may sue for the balance. As we have said, a rule of law which would allow this to be done, would operate most oppressively upon the railroad company. For a single wrongful act, which gave rise to but one liability, it might be harrassed with a dozen different actions. The contract of insurance is treated as an indemnity, and the insurer as a surety who is entitled to all the remedies and securities of the assured, and to

stand in his place. And we certainly cannot see that any principle of law will be violated in allowing the different insurance companies to unite with the owner of the property in an action to enforce the liability of the railroad company in this case.

The case of *School District v. Edwards, et al.*, 46 Wis. 150, presented an analogous question. There, two or more school districts brought an action to recover moneys in the hands of the defendants, belonging to such districts. Mr. Justice Lyon, in the opinion, says: "The fact the several school districts are entitled to the money in unascertained and probably in unequal proportions, is no impediment to this action. That is a matter between the districts with which the appellants have no concern. It is sufficient for the purpose of maintaining the action that they are jointly entitled to the money claimed." Page 159. Now, it is apparent that there was the same reason for saying, in the case last cited, that the defendants were liable, in separate actions, to each school district, as there is for taking the objection that the defendant company is not jointly liable to the plaintiffs in this case; and to hold that these plaintiffs cannot, upon the facts stated, unite in one action to enforce what is really but one liability or cause of action, but that each must bring a separate suit, would open the door to a litigation which would be most oppressive to the defendant, and which would produce much mischief. For these reasons we think the first ground of demurrer not well taken. Our views upon the first point, of course, dispose of the other grounds of demurrer.

The order of the circuit court, overruling the demurrer is affirmed.

for plain.

SIMAR & WIFE v. CANADAY.

53 N. Y. 298. [1873.]

Appeal from order of the general term of the supreme court in the third judicial department, setting aside a verdict in favor of plaintiffs and granting a new trial.

The plaintiffs are husband and wife, and brought this action jointly to recover damages for an alleged fraud on the part of defendant in inducing plaintiffs to convey to defendant certain premises known as the "Newtonville property," situated near Albany, and to receive in part payment therefor three

bonds and mortgages of \$1,000 each, which plaintiff alleged to be worthless. The property conveyed was owned by Mr. Simar. The three mortgages were, by his direction, and as a gift from him, assigned by the defendant to the wife, who joined with her husband in the deed of the premises.

Other facts appear in the opinion.

The jury rendered a verdict for plaintiffs, and exceptions were ordered to be heard at first instance at general term.

FOLGER, J. * * * 4th. Having thus shown that both Simar and his wife had a cause of action (if it be assumed that a case of fraudulent representations had been made out), the objection of the defendant, in its exact letter, returns.

That objection was, that no joint cause of action in favor of the plaintiffs had been made out. The cause of action we have found in the husband is that he is defrauded of the fee in the premises; that in the wife is that she is defrauded of her inchoate right of dower, which is consequent upon his title in fee. They are not strictly the same thing, yet they are bound together in the same property; they are taken out of the owners by the same instrument, and that instrument is induced and the two rights are lost, as is alleged, by the same fraudulent acts. One recovery will satisfy both claims, and one judgment be a bar to another action by either of the plaintiffs. The acts of the defendant were done at one time to both plaintiffs, and were an injury to both plaintiffs, inflicted at the same time; hence, there is such common interest in the subject of the suits as to authorize them to join in one suit, although the injury which each sustained is separate and distinct. In equity, this rule has often been announced; as where creditors, by different judgments, united in one action as plaintiffs to detect and repress the fraud of the debtor (*Brinkerhoff v. Brown*, 6 J. C. R. 139; see also *Fellows v. Fellows*, 4 Cow. 682); where owners of different tenements affected by a nuisance joined in an action to prevent it (*Peck v. Elder*, 3 Sandf., 126, note [a]); where proprietors of the different mill sites united in an action to restrain a diversion of the water course (*Reid v. Gifford*, Hopk., 416). And at law, if a covenant be joint expressly, it will not be construed to be several by reason of several interests, per *Jewett, J.* (*Pearce v. Hitchcock*, 2 N. Y. 388). In an action on an injunction bond, the subject of the action being the damage sustained by the obligees, they may all join as plaintiffs, notwithstanding the claim of one of them is different in character and

amount from that of the others. (*Loomis v. Brown*, 10 Barb. 325.) And the code (§ 59), having abolished all distinctions between actions at law and suits in equity, and provided for but one form of action, then (§ 117) enacts that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided. Here both plaintiffs have an interest in the subject of the action; be that subject the property conveyed, or the acts of the defendant and the consequent damage, and both have an interest in obtaining the relief demanded. "There is a common point of controversy, the decision of which affects the whole, and will settle the rights of all," so far as the issues in this action are concerned. See also *Hubbell v. Meigs*, and others (50 N. Y. 480.) * * *

*Judgment of General Term reversed.**

for plan.

GOODNIGHT v. GOAR

30 Ind. 418. [1868.]

FRAZER, J. The appellant and Geo. W. Collier and Levin Cambridge sued the appellees, Eli J. and Benjamin F. Goar, upon the following contract:

"Jefferson Township, Tipton County, Indiana."

"We, the undersigned, citizens of said township, agree and bind ourselves in case either of us is drafted into the service of the United States, to pay our proportionable amount to hire substitutes to fill our places; and this we agree, not only for the present impending draft, but for all other calls that may be made during the present rebellion, unless a majority shall agree to abandon the above arrangement.

Given under our hands this 10th day of February, 1865.

(Signed.)

G. W. COLLIER,
ELI J. GOAR,
BENJAMIN F. GOAR,
WM. H. GOODNIGHT,
LEVIN CAMBRIDGE."

It was alleged in the complaint that all these parties were en-

*See also *Schiffer v. Eau Claire*, 51 Wis., 385.

rolled in said township and liable to draft then impending; that the plaintiffs and the defendant Benjamin were drafted, and that the defendant Eli was not drafted; that each of the plaintiffs hired and paid a substitute for himself, Collier for fifteen hundred dollars, and Goodnight and Cambridge each for eleven hundred dollars; which several sums were reasonable and necessary; that the defendant Benjamin, by failing to report himself for duty, avoided military service and the necessity of procuring, and did not procure a substitute for himself; and that neither of the defendants has paid to either of the plaintiffs anything toward defraying the costs of said substitutes; though the same has been demanded.

A demurrer to the complaint, assigning the want of sufficient facts, amongst other causes, was sustained; and this is the only error assigned.

The question argued is, whether the plaintiffs could properly join in the suit; and we have heretofore held, upon full consideration, that, under the code, that question is raised by demurrer for want of sufficient facts. *Berkshire v. Schultz*, 25 Ind. 523. In that case, we expressed the opinion, that the rule declared in *Mann v. Marsh*, 35 Barb. 68, that "when two or more plaintiffs unite in bringing a joint action, and the facts stated do not show a joint cause of action in them, a demurrer will lie," was correct and best comported with the spirit of the code.

The code itself is not exactly definite as to who may be joined as plaintiffs. It provides, however, that judgment may be given for or against one or more of several plaintiffs (sec. 368), which was the practice in equity, though it was otherwise at law. It also provides (sec. 17), that all persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs, except in certain cases mentioned in the nineteenth section. Indeed, the code seems to have re-enacted the rules which had prevailed in courts of equity, as to who must join as plaintiffs, and may be joined as defendants. But as to those cases in which, in equity, plaintiffs might or might not have joined, at their option, the code does not expressly speak, for the reason, probably, that the general rule in equity in relation to parties plaintiff was not founded upon any uniform principle and could not be expounded by any universal theorem as a test. *Sto. Eq. Pl.* § 539. And it may have been thought safer, therefore, to leave each case to be decided by the courts upon authority and analogy. That it was intended that

the rules of pleading in courts of equity should govern the subject is quite evident from those provisions of the code which prescribe the relief which may be granted, and to whom; in this respect conforming in all respects to the established practice of those courts—a mode of administration quite impracticable in a great many cases, unless the parties might be as in chancery.

The present inquiry, is, then, in view of the considerations above stated, reduced to this: could these plaintiffs formerly have joined in chancery? In solving this question we may be aided by considering the nature of the contract upon which the suit is brought. The obligations which it imposes are strictly several, each party for himself becoming bound in a certain event to pay. The obligation thus assumed is, under the facts alleged, to each one of the plaintiffs separately, by each defendant, for one-fifth of such sum as that plaintiff was obliged to pay for a substitute for himself. This proportion, thus due to one, cannot be either increased or diminished by the fact that another plaintiff is also entitled to recover from the same defendant a like proportion of the sum paid by him for a substitute. Each plaintiff has an interest only in compelling the defendants severally to reimburse him, and cannot possibly be affected by the success or failure of any one of his co-plaintiffs in the suit. Each plaintiff seeks by the action to attain an object for himself exclusively,—the recovery of so much money as the defendants respectively owe him. They have therefore no common or joint interest in the relief sought, which is the object of the suit. Nor have they any common or joint interest in the subject or foundation of the action, which is the failure of the defendants respectively to pay according to contract. The failure to pay Goodnight does not concern any other plaintiff, and so, the failure to pay each of the plaintiffs is a matter of entire indifference to each of the others. If each two of the five persons to this agreement had mutually contracted by a separate writing to pay one-fifth of whatsoever sum might be necessary to procure a substitute for either, if drafted, there would have been twenty separate paper contracts, instead of one as now. It was a matter of convenience merely that one writing, executed by all, should have been adopted to evince their several undertakings; but it imposed exactly the same liabilities as if twenty writings such as we have mentioned had been used. In the latter case it would be too plain for doubt that each plaintiff must sue separately. Why should it be otherwise now? There

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is certainly no good reason. The statute has, it is true, provided, that persons severally and immediately liable on the same instrument may, all or any of them, be sued in the same action at the plaintiff's option. 2 G. & H. 50, sec. 20. This perhaps authorizes each of the present plaintiffs to join all the defendants in one suit. It is but the old equity rule as to defendants, in cases upon a joint and a several contract, extended by the statute. Story Eq. Pl. § 159. It may, however, be worthy of consideration whether this statute was intended to apply to cases where by one instrument each maker becomes singly liable for a sum for which no other maker can in any event be held. But that question is not before us, nor is it now intended to express any opinion upon it.

In *Tate v. O. & M. R. R. Co.*, 10 Ind. 174, it was said that "all who are united in interest must join (as plaintiffs) in the suit, unless they are so numerous as to render it impracticable, while those who have only a common interest in the controversy, may, one or more of them, institute an action. This, however, must not be understood as allowing, in all cases, two or more persons having separate causes of action, though arising out of the same transaction, to unite and pursue their remedies in one action. Several plaintiffs cannot by one complaint demand several matters of relief which are plainly distinct and unconnected. But where one general right is claimed, where there is one common interest among all the plaintiffs, centering in the point in issue in the cause, the objection of improper parties cannot be maintained." This statement of the general rules governing the subject, though quite comprehensive, is perhaps as specific as the state of the authorities will warrant. The matter is, in considerable measure, a question for the exercise of judicial discretion under the circumstances of each particular case, with a view to practical convenience in the administration of justice.

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join.*

In the case before us there is in the plaintiffs no community of interest in any matter involved in the suit; no right common to all is claimed; every thing is separate save only that the right asserted by each is founded in a contract which for convenience happens to be upon the same sheet of paper. We have failed to find any warrant in the adjudged cases for a joinder of plaintiffs under such circumstances. The only possible suggestion in its favor is that a multiplicity of suits would be avoided; but even that is more apparent than real, and would

be accomplished only in name, and not in fact. The number and variety of separate issues to be tried and of distinct judgments to be rendered would not be diminished in the least.

The judgment is affirmed with costs.

OWEN v. FRINK.

24 Cal. 171. [1864.]

By the Court, SHAFER, J.

This is an action of ejectment brought to recover the possession of lands situated in Suisun Township, county of Solano.

The defendants answered jointly, disclaiming all title to or interest in the premises demanded, except as to a certain part thereof particularly described, and as to that part the defendants aver that they hold and occupy it by title derived from one Brower. That Brower, in May, 1857, made a verbal contract with the plaintiff for the purchase of the particular part named, for one hundred dollars, payable in labor as the plaintiff should require, or in cash, at Brower's election. The plaintiff bound himself by the contract to execute a deed of the lot to Brower, on full performance on his part, and that Brower, in pursuance of the contract, went into possession of the lot, and made valuable improvements thereon. That he performed labor for the plaintiff, under the contract to the amount of thirty-five dollars, and always worked for the plaintiff when requested by him so to do. That on the 9th of June, 1858, the defendants succeeded to the rights of Brower, and on the same day tendered to the plaintiff one hundred dollars and presented to him for execution a quit claim deed running to them, and that plaintiff declined the tender and refused to execute the deed. Defendants also aver that they have ever been ready and willing to pay the balance of the consideration due, and they offer to pay the one hundred dollars tendered into court, and pray that the plaintiff may be decreed to perform his contract specifically.

The replication denies all the allegations in the answer, asserts the statute of limitations as a defense, and the statute of frauds also, and claims that the rights of the defendants, if they ever had any, have been forfeited on the ground of an alleged repudiation by them of the plaintiff's title to the land manifested in speech and by adverse occupation. The trial was

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by the court, and on the findings judgment was entered for the defendants in conformity to the prayer in the answer. The plaintiff appeals from the judgment and from an order denying a new trial. * * *

4. It is claimed by the appellant that inasmuch as the answer sets up, in effect, that the defendants were joint assignees of Brower's right, that the documentary evidence showing that one part of the lot affected by the equitable title was assigned to Frink, and another and distinct part assigned to Peko, should have been excluded by the court.

To this objection there are two answers:

1. The objection taken to each document, as offered, was "ir-relevancy." The objection was too general. (*Dreux v. Domee*, 18 Cal. 83.) Where objection is taken to the introduction of evidence, the party objecting should, as a general rule, state the exact point of his objection. (*Kiler v. Kimball*, 10 Cal. 267.) If this rule had been observed at the trial of this case, the defendants, perhaps, could have produced proof of a joint assignment from Crockett to them, subsequently executed.

It is true that if an estate should be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance; for each party's case would be distinct, and would depend on its own peculiar circumstances; and, therefore, there should be a distinct bill upon each contract. (St. Eq. Pl. Sec. 272.) But that is not this case. Here there was but one contract to convey, though the lands affected by it have come to the defendants respectively in divided moities. The general rule is, that unconnected parties may join in bringing a bill in equity where there is one connected interest among them all, centering in the point in issue in the cause.

In *Fellows v. Fellows*, 5 Cowen, 682, the bill charged that the defendants had confederated among themselves, and with the debtor of the complainants, to defraud the complainants by taking a conveyance to each, in separate parcels, of all the debtors' real and personal property, without consideration, and with intent to avoid execution upon the plaintiff's judgment. To this bill one of the defendants demurred for multifariousness. The demurrer was overruled, and substantially on the ground above suggested. In the case at bar the plaintiff made but one contract to convey, and he can be subjected to but one suit upon it for damages at law, and to but one for specific performance in

equity. Though the defendants are not jointly interested in the contract, in the narrow sense of that term, yet, they have a common interest that it should be specifically performed to the whole extent of its terms. The plaintiff is in no manner prejudiced by the joint assertion of the equitable right in the answer, for the judgment will be not only a joint, but several, bar against any further proceedings upon the contract. * * *

Judgment affirmed.

for def.

PELLEY v. BOWYER.

7 Bush (Ky.) 513. [1870.]

Judge HARDIN delivered the opinion of the court:

The appellant became the administrator of the estate of Joseph Bowyer in 1858, and made a settlement of his accounts as such in March, 1861, showing a balance of assets in his hands of \$1,386.99 for distribution, of which the appellees—the several children and grandchildren of William Bowyer, deceased, a son of said Joseph—were entitled collectively to one-third part as heirs and distributees of said Joseph Bowyer; and in September, 1868, the appellees brought this action jointly against the appellant to recover an alleged balance of their several shares of the amount found due by the settlement to them as representatives of William Bowyer, deceased, as aforesaid, with interest from the date of the settlement. The suit being by ordinary proceeding upon the appellant's bond as administrator, and it having resulted in a joint judgment for the plaintiffs for \$209.07, as the aggregate balance of their several shares with interest as claimed, the defendant has appealed to this court.

Proper and timely objection was taken in the court below to the assumed right of the several plaintiffs to recover jointly, and as one demand, their respective claims as distributees. Whether or not the court erred in overruling this objection is the principal question to be determined on this appeal, and the only one we deem it necessary to decide.

The Civil Code of Practice, section 36, provides that “of the parties to the action those who are united in interest must be joined as plaintiffs or defendants”; and there can be no doubt that in equitable actions for the settlement of estates several distributees might unite as plaintiffs. But except in a par-

ticular class of cases, not embracing this, we know of no authority for uniting as co-plaintiffs several parties having separate and independent rights of action against the same defendant, or for a joint recovery thereon, unless the objection for the misjoinder be waived. It seems to us there was no such common object or unity of interest in the plaintiffs in this case as was necessary to entitle them to sue and recover by a joint judgment their several claims against the defendant, and the judgment is therefore erroneous.

Wherefore the judgment is reversed, and the cause remanded for further proceedings or orders not inconsistent with this opinion.*

_____ for def.

McINTOSH v. ZARING.

150 Ind., 301. [1898.]

McCABE, J. The appellees sued the appellants in the Washington circuit court to recover attorney's fees upon a written contract. There was an answer filed, leading to issues of law and fact. The venue was changed to the Jackson circuit court. A trial of the issues of fact in that court resulted in a verdict and judgment in favor of the plaintiffs in the sum of \$7,500, over appellants' motion for a new trial. Among the numerous errors assigned are that the trial court erred in overruling a demurrer to the amended complaint for want of sufficient facts; that said complaint does not state facts sufficient to constitute a cause of action; and that the court erred in overruling the defendants' motion for a new trial. The contract sued on is as follows: "Ellen McIntosh and Andrew J. McIntosh, her husband, have this day employed as counsel to contest the will of W. C. DePauw, deceased, and to conduct all legal proceedings for that purpose, Friedly and Giles, of Bedford, Indiana, Zaring and Hottel, of Salem, Indiana, and C. L. & H. E. Jewitt, of New Albany, Indiana. Suit to contest said will is to be immediately filed and prosecuted with all reasonable dispatch; and for all their services, of every kind, performed in relation to

*Compare *State v. Thornton*, 56 Mo., 325, in which a number of distributees were permitted to join as relators in an action in the name of the State on an administrator's bond, where their interest had not been severed by final settlement and order of distribution.

said suit, said attorneys are to receive the following compensation, and no other, viz.: For their services in the event that the will of W. C. DePauw is set aside and Ellen McIntosh declared entitled to share in his estate, a fee equal to twenty-five and a half (25½ per cent) per cent of the value of the estate which she shall thus be entitled to, and does receive; and in the event of a compromise or adjustment before a trial is begun, whereby said will is allowed to stand, a sum equal to twelve and a half per cent (12½) of the amount so received or stipulated to be received by her. They agree to pay said fee as follows: One-third to Friedly & Giles, one-third to Zaring & Hottel, and one-third to C. L. & H. E. Jewett. Ellen McIntosh. A. J. McIntosh. Friedly & Giles. C. L. & H. E. Jewett. Zaring & Hottel." The complaint alleged the performance of the contract on the appellees' part, and that the suit was compromised before trial, by which appellant Sarah E. McIntosh received from the estate of said W. C. DePauw \$250,000, and that she fraudulently concealed the knowledge of the amount so received, and falsely represented to them that she had only received \$50,000 from said estate by said compromise; that, relying on such representations, the appellees had settled with and accepted from her 12½ per cent, of \$50,000; that 12½ per cent on the excess received by her was still due them, and remained unpaid,—demanding judgment for \$30,000 and other proper relief. It is also alleged that Charles L. and Henry E. Jewett refused to join as plaintiffs, and for that reason they were made defendants. They filed an answer disclaiming all interest in the suit. It is also alleged in the complaint that the appellees John A. Zaring and Milton B. Hottel were attorneys at law, engaged in the practice of their profession, under the firm name of Zaring & Hottel, at the town of Salem, Washington county, Ind., and that appellee Joseph Giles and the said George W. Friedly were at said date engaged in the practice of law in the city of Bedford, Lawrence county, Ind.; that, after the performance of said services under said contract, said George W. Friedly had died, and the plaintiff Edith M. Friedly had been appointed administratrix *de bonis non* of the estate of said deceased.

We hold that the contract sued on did not create a joint right of action in all the plaintiffs, and hence the legal effect of the written contract was the same as if there had been three several and separate written contracts in favor of each of the three several firms or groups of attorneys; and hence we hold that the

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contract itself did not create a joint right of action in said attorneys, and cite the following cases supporting that conclusion: Goodnight v. Goar, 30 Ind. 418; Tate v. Railroad Co., 10 Ind. 174; Lippard v. Edwards, 39 Ind. 165; Martin v. Davis, 82 Ind. 41; Harris v. Harris, 61 Ind. 117; Elliott v. Pontius, 136 Ind. 641 (35 N. E. 562, and 36 N. E. 421). * * * * *

We find that the complaint does not allege that Friedly and Giles were partners at the time, but it does allege that Zaring and Hottel were partners, engaged in the practice of the law. It is contended, however, that enough appears in the complaint and in the written contract sued on to disclose that Friedly and Giles executed the contract as partners. And, in support of this contention, we are cited to Cook v. Frederick, 77 Ind. 406; Henshaw v. Root, 60 Ind. 220; Telegraph Co. v. Huff, 102 Ind. 535 (26 N. E. 85); Crowell v. Bank, 3 Ohio St. 406, and other authorities. We have examined them, and find they do not sustain the appellants' contention as to the point in question. The manner in which the contract was signed by Friedly and Giles would be competent evidence as tending to prove the existence of a partnership between them, and that is as far as the authorities cited by appellants go. Competent evidence tending to prove a material fact is not the fact or the equivalent thereof. The fact must be alleged affirmatively before the demurrer admits it to be true. A demurrer admits as true only such allegations as are properly and sufficiently pleaded. Peyton v. Kruger, 77 Ind. 486; Johnston v. Griest, 85 Ind. 503; Platter v. City of Seymour, 86 Ind. 323; State v. Foulkes, 94 Ind. 493. It must therefore be held that the complaint does not allege or disclose the existence of a partnership between Friedly and Giles, thereby showing a want of sufficient facts to constitute a cause of action as to one of the plaintiffs, namely, Edith M. Friedly, administratrix of George W. Friedly, deceased. It is contended by the appellants that there is another element in the complaint having the same effect as if the existence of said partnership between Friedly and Giles had been alleged in the complaint; and that is that while the contract sued on is separate and distinct as to and between the three firms or groups of attorneys, as if it had been written on three separate papers, and each separately signed by the several firms, it is joint as between the members of each firm or group of attorneys; and this contention, we think, must prevail. The amount stipulated to be paid to Friedly and Giles was *in solido*. It was not stipulated what amount

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of the share to be paid to them should be paid to either Friedly or Giles; and the same is true as between the other two firms or groups of attorneys mentioned in the contract. An eminent author on Contracts says: "Where the payment in the first place is of one sum *in solido*, and afterwards to be divided among the payees, there generally, the interest of the payees is joint; but, where the first payment is in several sums among the several payees, there, generally, their interest is several." 1 Pars. Cont. (5th Ed.) 19. The interest, therefore, of Friedly and Giles, even in the absence of a partnership between them, is, as between themselves, joint in the share to be paid to them under this contract. On such a contract the law vests the right of action exclusively in the survivors where one or more of the joint obligees have died. 1 Pars. Cont. (5th Ed.), 31. As was said by this court in *Railway Co. v. Adamson*, 114 Ind., at pages 285, 286 (15 N. E., 7): "The question with which we have to deal is important, and not entirely free from difficulty; but, after the most careful study we have been able to give the subject, we feel bound to hold that the Code does not change the common-law rule. The question goes back of the procedure, and takes up the element of the right itself. The right the statute does not profess to change. It reaches only the remedy. In the case of a joint contract, the whole right—the unified interest—vests in the survivors. Upon them falls the entire right. If they do possess the entire right, then they are the real parties in interest, since it is inconceivable that, if they do possess the entire right, any other person can be a real party in interest. The principle of the common law vesting the whole right in the survivors is not changed by the Code, and, so long as the principle remains unchanged, the persons possessing this entire right must be regarded as the real parties in interest. It requires legislation to abrogate a rule of law, and the courts cannot assume the functions of the legislature. Mr. Pomeroy, who as strongly as any one urged a liberal construction of the Code, and an extension of its provisions, affirms that the common-law principle has not been abrogated. In discussing the question he said: 'In actions *ex contractu*, all the persons having a joint interest must be made plaintiffs; and when one of them dies, the action must be brought or must proceed in the names of the survivors.' The personal representatives of the deceased obligee or promisee cannot be joined as co-plaintiffs; and in the same manner, in actions *ex delicto* for injuries to

At common law, a joint action was to the survivors. The Code has not changed this; hence since the survivor has entire right he is necessarily the only party in interest & hence the only one who can sue.

Hence the action was to the survivors, & deceased partner's estate has no standing in court.

personal property, all the joint owners must unite, and, if one of them dies, the action is to be prosecuted by the survivors alone. These common-law rules remain in full force.' "

It follows that the complaint shows upon its face that it did not state facts sufficient to constitute a cause of action in favor of one of the plaintiffs, namely, Edith M. Friedly, administratrix of George W. Friedly, deceased, the same as if the complaint had alleged the existence of a partnership between Friedly and Giles.

Judgment reversed.

for def.

SEVIER v. RODDIE.

51 Mo., 580. [1873.]

ADAMS, Judge, delivered the opinion of the court.

only this is not a case
This case came here on a demurrer to the plaintiff's second amended petition, which was sustained by the circuit court. The petition alleges in substance that plaintiffs were the sureties of the defendant in the state of Tennessee on two several bonds for payment of money; that a judgment was obtained in Tennessee in a court of general jurisdiction against the plaintiffs and defendant, and that the plaintiffs as the sureties of defendant paid the amount of such judgment and costs, and that afterwards, and without any notice to defendant, a judgment was rendered in the Tennessee court in favor of plaintiffs, for the amount they so paid as sureties for defendant; and the petition sets forth the statutory laws of Tennessee, which allows judgments of this character to be rendered in summary proceedings in favor of sureties, jointly or severally, and the petition then prays judgment for the amount of the Tennessee judgment, so rendered in favor of the plaintiffs as the defendant's sureties.

1. If it was the design of the plaintiffs to base their right of recovery upon the summary judgment rendered in their favor by the Tennessee court without any notice to the defendant, it is clear, to my mind, that they have no standing in court. Whatever force a judgment may have under the statutory laws of Tennessee, it can have no extra-territorial validity so as to authorize a recovery here. (Salle v. Hays, 3 Mo., 116; Gillett v. Camp and Wife, 23 Mo., 375; Foote v. Newell, 29 Mo., 400; Smith v. McCutcheon, 38 Mo., 415; Roach v. Burns, 33 Mo.,

319; Sto. Conf. Laws, § 539; Abbott v. Shepherd, 44 Mo., 273; Latimer v. Union Pac. R. R. Co., 43 Mo., 105.)

2. If the plaintiffs are suing for money paid by them as sureties for defendant on the implied assumpsit of the defendant as principal to refund the amounts so advanced by them, then the objection that they cannot join as plaintiffs in such suit is well taken. At least there is nothing in this petition to show that the defendant's obligation or duty towards them, was a joint one. They did not undertake as partners or jointly to become the sureties of the defendant. No such allegation is made in the petition and the natural inference therefore is, that each must stand on his own right as a separate surety. They cannot join in an action at law for the recovery of the moneys advanced by them, the implied promise being to each separately and not to them jointly (Gould v. Gould, 8 Cowen, 168; 3 B. & P. 225, 2 T. R. 283).

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joinder of
plaintiffs*

In suits to be subrogated to the rights of the creditor on collaterals held by them, sureties are allowed to join and indeed must join, because in equity they are jointly interested, to the extent of the payments made by each, in such collaterals.

*In equity
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join, when
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Judgment affirmed. The other judges concur, except Judge

Vories not sitting.

for def.

RIZER v. CALLEN.

27 Kan., 339. [1882.]

HORTON, C. J.: A. W. Callen, John Cross, John K. Wright, Henry Mitchell, A. Clough, R. E. Lawrenceeson, and Moses Waters, with others, were sureties upon the official bond of Robert O. Rizer the county treasurer of Davis county. His term of office as treasurer expired on Oct. 12, 1880, and there was due from him as such treasurer the sum of \$12,837.47. Of this amount Rizer paid \$1,248.55, leaving a balance due of \$11,588.92. Afterward the parties above named, with other sureties, were sued upon the official bond of the defaulting treasurer to recover the moneys so withheld by him, and the suit was dismissed by compromise as to the said named parties, upon the payment by them of \$3,500. On July 6, 1881, the sureties who had made this payment commenced their joint action against the plaintiff in error (defendant below), to recover \$3,500,

with interest thereon from the 5th of March, 1881. Upon trial judgment was rendered in their favor for \$3,653.11; and the defendant below complains of this judgment, for several reasons.

1. It is contended in this behalf that as the testimony shows that each plaintiff furnished his proportion of the total payment, they have no interest in common, and therefore not being united in interest could not be joined as plaintiffs.

It appears from the record that, although Rizer was indebted in a sum exceeding \$11,000, and an action had been brought against all of his sureties upon his official bond for the recovery of that amount, that a compromise was made by the plaintiffs below, whereby, for the consideration of \$3,500, they were released and discharged from all further liability on the bond. While it is true that each of the sureties paid \$500, or gave notes that were taken in satisfaction of \$500, to make the \$3,500, no one surety was released upon the payment of \$500, but the whole of the \$3,500 was jointly paid by said sureties for the defaulting treasurer; and the sureties were jointly interested in making the payment of the \$3,500, because the release was obtained, not upon the payment of \$500 by each, but upon the joint payment of the \$3,500. If the compromise with the commissioners had been that each surety upon his individual payment of \$500 would be released and discharged from all liability, there would be no joint or common interest between the plaintiffs; but as these sureties agreed jointly to settle with the county for \$3,500, to obtain a discharge of all, paying the \$3,500, and thereafter performed their agreement by jointly paying said sum, they could join in a suit to recover the sum so jointly paid. In the case of *Tate v. R. R. Co.*, 10 Ind., 174, to which we are referred by counsel of plaintiff in error, the plaintiffs were the owners of several lots, in front of which the railroad company erected for a roadbed in the street an embankment and trestle-work, which excluded them from the street. The court there held that the plaintiffs, though not united in interest with each other, had the right to join in an action to compel the company to fill up the street on each side of the railroad track so as to make it passable, or to remove the road. We do not think this case is of any force against the ruling of the district court. The other authorities cited by the same counsel are to the effect that where two or more persons have separate causes of action against the same defendant,

though arising out of the same transaction, they are not allowed to unite and pursue their remedies in one action. We fully agree as to the law thus declared, but do not think the cause at bar controlled by it, because, under the compromise, a certain payment was agreed to be made for the discharge of the sureties, and this payment was jointly made by them for the discharge of all making the payment. The parties to this action were united in interest in making the compromise—in raising the \$3,500, in paying the \$3,500, and therefore had a right to be joined as plaintiffs. (1 Parsons on Contracts, 5th ed., ch. 20, p. 20; Appleton v. Bascom, 3 Mete., 169; Hopkins v. Lane (N. Y. Ct. of Appeals, Jan., 1882), 13 Rep., 343; May v. May, 1 C. & P., 44.) In the last case the action was brought by the plaintiffs to recover the sum of £446 paid by them as bail for the defendants. To make up this sum of money, each of the plaintiffs advanced his share. It was therein contended by defendants that separate actions ought to have been brought by each of the plaintiffs, because the money paid was the money of each, and that there could not be a joint action unless it was paid from a joint fund. The court was of the opinion that as the plaintiffs made the payment to the defendants in one sum, and as a joint payment, the action could be maintained in the form in which it was brought. • • •

Judgment affirmed.

for plain

(b) *Parties Who Must Join.*

DEWEY v. CAREY.

60 Mo., 224. [1875.]

WAGNER, Judge, delivered the opinion of the court.

The petition alleges that defendant instituted a suit by injunction against Thomas D. Price, Leroy D. Dewey and the plaintiff, and that upon executing a bond to them a temporary injunction was granted; that upon a hearing of the cause the injunction was dissolved and the petition dismissed; but no assessment of damages was had at the time of the dissolution. This action is now instituted by the plaintiff alone on the bond to recover damages for alleged breaches.

A demurrer was sustained to the petition because the other obligees in the bond were not made plaintiffs.

Where an obligation is executed to two or more jointly, all the obligees must sue upon it. They cannot separate the liability and bring an action in favor of each. If the plaintiff can maintain this suit, then Leroy D. Dewey can maintain one, and Thomas D. Price still another, and thus the defendant will be harassed by three suits on the same obligation which was jointly made to the three persons. By our law all contracts are joint and several and a party may sue any one or more debtors against whom he has a demand. But the principle has no application to the obligees in a contract, who must sue jointly as plaintiffs. Where the contract made by the obligor is a joint one, one obligee cannot make it a several obligation by suing alone. (Clark v. Cable, 21 Mo., 223; Robbins v. Ayres, 10 Mo., 538; Wells v. Gaty, 9 Mo., 561.)

To permit one party to sue might result in great injury in a case of this kind. One plaintiff might recover the entire penalty of the bond, yet this would be no bar to another action by a plaintiff who was not a party to the suit; and as there could be no apportionment the party would be made liable for obligations that he never entered into. It is true that it may happen in some instances that one obligee has sustained more damage than some of his co-obligees, but this would present no insuperable objection, as under our practice act I think the judgment might be adjusted so as to secure the respective rights of the parties.

The judgment must be affirmed; the other judges concurring.

for def.

HUNTER v. YARBOROUGH.

92 N. Carolina, 68. [1885.]

SMITH, C. J.: In the month of October, 1854, Priscilla Thomas, being then the owner of two young female slaves, by deed of gift conveyed them to her married daughter, Isabella C. Hunter, for her own use during life, and as trustee to hold the remainder during the period of her own limited possession and enjoyment, for the use and "benefit of all and singular the children of the said Isabella C. Hunter," designating by name, as such, in the deed, Jane Elliott and Martha Adaline. Besides these two, other children, B. W. and John M. Hunter, the

plaintiff, were born during the marriage. Upon the death of her husband, the said Isabella C. intermarried with the defendant, Eli Yarbrough, by whom she had six other children.

Some time previous to 1860, and during his wife's life, the defendant disposed of said slaves, and their issue subsequently born, as his own, by selling them to be removed, and in assisting in their removal beyond the limits of the state, received in payment therefor \$1,750 in money.

Isabella C. died in August, 1880, and the defendant refusing to account for said remainder or any part thereof, the plaintiff assenting to the sale, seeks in this action to charge him with the principal money, and recover his share thereof.

The defendant demurs to the complaint, for that upon its face it appears "that the court has no jurisdiction of the subject of the action."

Upon the hearing of the issue raised by the demurrer, it was overruled and the defendant allowed to answer the complaint, from which judgment the defendant appeals.

The demurrer fails to specify the grounds of objection to the complaint, as it should do, according to the construction put upon the statute in *Love v. Commissioners*, 64 N. C., 706, and in its present form was wholly needless, since the want of jurisdiction cannot be waived and may be taken advantage of at any time, even in this court. Code, §§ 240, 242; *Gaskill v. Commissioners*, 85 N. C., 278; *Tucker v. Baker*, 86 N. C., 1; *Hawkins v. Hughes*, 87 N. C., 115.

No ground shown by all the remaindermen; a demurrer would have been good.

But in the argument supporting the demurrer, it is contended the action is founded on an implied contract to keep and pay over the principal funds of those entitled in remainder at the expiration of the precedent, particular estate, and as the part claimed by the plaintiff is less than \$200, cognizance of the claim resides in the court of a justice of the peace.

This is a misconception of the action as presented in the complaint. Assuming the defendant's obligation to rest upon an implied contract, it is a contract to account for and pay over the entire sum received to those entitled, and not a series of contracts to pay over to each his and her ratable part of it.

This view of the case shows that all the remaindermen, personally or by representation, ought to be parties to the cause, so that one recovery may be effected for all and the defendant not exposed to a succession of separate suits by each.

The demurrer, if taken to the defect of parties plaintiff, would

this action should have been brought by all the remaindermen; a demurrer to this ground would have been good.

have been effectual; Code § 239, par. 4; *Gill v. Young*, 82 N. C., 273.

The action, however, rests upon an equity of the persons entitled in remainder to waive the tortious disposition of the slaves and follow and secure the substituted fund resulting from the sale.

In *McKeil v. Cutlar*, 4 Jones Eq., 381, Pearson, C. J., uses this language: "We are satisfied that Catharine Cutlar, the defendant's intestate, sold the slave out and out, with the intention that he should be run off and taken to parts unknown, and that she received \$500 as the price. Having only a life estate, it was against conscience for her to sell the absolute interest, except upon the footing that, as the charge of a criminal offense, which was made against the slave, rendered it expedient for the remainderman, as well as for herself, to sell him, she would do so, and hold the price for their mutual benefit. This is a clear equity, which the plaintiff has a right to enforce against the personal representative of Mrs. Cutlar to the extent of the assets."

After a full discussion of the learning on this subject, and an examination of the adjudged cases not found to be in entire harmony, the result is arrived at and announced as the true doctrine by our late associate, Mr. Justice Ruffin, in *Isler v. Isler*, 88 N. C, 576: "The court feel at liberty to adopt their own rules with regard to the matter, and to them none seems as simple or just as the one laid down in *McKeil v. Cutlar*, *supra*, which was also recognized in *Cheshire v. Cheshire*, 2 Ired. Eq., 569, allowing the price to represent the slave and to be enjoyed by the life-tenant during the residue of his life, and then without abatement to him in remainder; provided he shall elect to ratify the sale and take the fund." These suits were in the court of equity and the fund was pursued and reached in the hands of the life-owner, as a trustee, liable to account for the money as such.

The present case is stronger, for, besides the relations of the owners of the particular towards the owners of the remainder estate, in her deed, the donor proceeds in direct words "to constitute and appoint the said Isabella C. Hunter, a trustee to hold the said negroes during her natural life for all and singular the children of said Isabella C. Hunter, their heirs and assigns forever."

The demurrer was, therefore, promptly overruled, and the

necessary parties can be made in the court below, and the defect already noticed in this respect removed.

Let this be certified for further proceedings in the Superior Court.

No error.

*Affirmed.**

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JONES v. FELCH.

3 Bosworth (N. Y. Supr.), 63. [1858.]

This is an appeal by the defendant from a judgment in favor of the plaintiff, upon a demurrer to the complaint, rendered in Jan., 1858.

The complaint sets forth that on the 22d of April, 1856, the defendant delivered and executed an agreement, in writing, unto the father of the plaintiff, whereby he hired and took of him certain premises therein described, for the term of three years from the first of May, 1856, the rent payable quarterly. That the lessor died on the first of May, 1857, being the owner, in fee, of the demised premises; that he left the plaintiff, and five others who were named, his children and sole heirs at law; that the rent which fell due on the first of November, 1857, had not been paid by the defendant, nor any portion of it; that the amount was \$500, of which the plaintiff is entitled to one-sixth, or \$83.33, for which sum he demanded judgment.

The defendant demurred, on the ground that there was a defect of parties plaintiff; that the plaintiff could not maintain this action without joining with him his co-heirs-at-law.

The demurrer was heard before Mr. Justice SLOSSON, who overruled the same, and gave liberty to the defendant to answer upon payment of costs within ten days. If this was not done, a judgment was to be entered against him for the amount claimed, with interest and costs. The defendant, not having answered, a judgment was entered, from which the present appeal is taken.

By the court, HOFFMAN, J.: The first inquiry is, what was the rule before the code?

It was well settled at common law that tenants in common of

*Accord: *Edwards v. Welton*, 25 Mo., 378; *Seay v. Sanders*, 83 Mo. App., 478.

a reversion of land upon lease might either join in an action for rent or bring several actions.

In *Martin v. Crompe* (1 Lord Raymond, 340), Holt, Justice, said: "That if there are two tenants in common of a reversion expectant upon a term of years, upon which rent is reserved, they may join in debt for the rent, or sever; and that one of them may have an action for a moiety of £20 rent, but not for £10; and so it had been adjudged.

Midgely v. Lovelace (Carthews' Rep., 289), is to the same effect.

This apparently artificial distinction as to the form of the action is noticed by Parke, Baron, in *Thomas v. Thomas* (5 Wels., H., and Gordon Exch. Rep., 33). He appears to recognize it and states the rule itself to be undoubted law.

In *Henniker v. Turner* (4 Barn. & Cres., 157), Chief Justice Abbott treats the distinction as unsubstantial, but avoids it by holding it inapplicable to an action of covenant, even if it were applicable to an action of debt. The rule that one tenant in common could sue for his aliquot portion of rent reserved was expressly decided, the case raising the very point on special demurrer. See further, *Beer v. Beer* (9 Eng. L. and Eq. Rep., 468).

The rule that the rent incident to a reversion becomes apportioned by a grant, or by a descent is stated, and the reasons well explained in *Gilbert on Rents*, p. 172 (Law Library, vol. 20, p. 54). He states that not only the reversion may be disposed of in parts, as in its nature severable; but the rent, as incident to the reversion, may be divided also. The elementary writers also lay down the rule with great unanimity. (*Crabbe's Law of Real Property*, §2318, a; *Cary on Landlord and Tenant*, 214; *Chitty on Pleadings*, vol. 1, 566; *Bradby on Distresses*, p. 41.)

In *Crosby v. Loop and others* (14 Ill. Rep., 330), the court say: "On the death of the lessor, the rent has to be apportioned among the heirs on whom the estate is cast. In all cases of the apportionment of rent, it is the duty of the tenant to pay each party the proportion of the rent to which he is entitled. This liability of the tenant forms an exception to the rule that an entire contract cannot be apportioned, and that a debtor cannot be compelled to pay a single demand in parcels, to several persons. The exception had its origin in reasons of policy and convenience, and has been long and firmly established."

The statement of the rule by Justice Nelson, in *Cole v. Pat-*

terson (25 Wend., 456), is then clearly warranted by authorities, even admitting that the case itself is not decisive, and is open to the criticism of counsel.

The difference between tenants in common and co-parceners is shown in the case of Decharms v. Horwood (10 Bing., 526). The court say: "The authorities all agree that whatever be the number of parceners, they all constitute one heir. They are connected together by unity of title and unity of interest, and one of them cannot distrain without joining the others in the avowry." The hardship of being exposed to three actions instead of one was alluded to by Chief Justice Tindal.

The counsel of the appellant has taken the distinction that, although tenants in common could sever and bring separate actions, yet coparceners could not; that a tenancy in common at common law could only be created by purchase or act of the party, and could not be by descent. Hence that, at common law, these heirs could not be tenants in common, but would take only as coparceners by custom, some being males, and then must sue jointly. In other words, as these heirs could not have been tenants in common at common law, they have no title to the privileges given to such tenants by the law to sue separately.

But the answer appears to be decisive, that since the year 1786, under the statute of descents of that year, the heirs of a party seized are tenants in common. The rules applicable to such tenants, when constituted by devise or grant, are equally applicable to them when constituted by descent, unless something arises out of the new method of creating such a tenancy which might prevent it. None such can be suggested.

The next question is, whether the code has varied this previous rule.

The 117th section provides that all persons having an interest in the subject-matter may be joined as plaintiffs. This would sanction an action by all the heirs in accordance with the opinion of Lord Holt, before cited; but does no more than sanction it.

The 119th section is, that of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants. It provides for the exceptional case of a refusal to join as a plaintiff.

We apprehend that this union of interest refers to such cases as those of joint tenants, co-trustees, partners, joint owners or joint contractors simply; where, in fact, a separate judgment in favor of one of them would not be proper on the case

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as stated in the complaint. It is true that, under section 274, a separate judgment may be had, in a case which does distinctly present a joint cause of action only; but this is only when on the proofs it turns out that a separate action could have been maintained.

But on a demurrer to a complaint, we apprehend that the test of the unity of interest intended in the 119th section is, that joint connection with, or relation to the subject matter, which, by the established practice of the common-law courts, will preclude a separate action.

We think that the judgment must be affirmed with costs.

Ordered accordingly.

for plain.

HOPKINS v. LANE.

87 N. Y., 501. [1882.]

Appeal from judgment of the general term of the supreme court, in the third judicial department, entered upon an order made September 8, 1874, which denied a motion for a new trial, and directed judgment in favor of the plaintiffs on a verdict.

EARL, J.: This action was brought to recover on a promissory note given in part payment of cheese sold by the plaintiffs to the defendant, Daniel W. Lane, and to Darius W. Benjamin and Quincy Matthewson. The cheese was delivered and each of the purchasers gave a note for his share of the purchase money. This note was given by Daniel W. for his share, and was signed by Victory L. Lane as surety for him. The defendants, in their answer, set up a counter-claim for breach of warranty and fraud in the sale of the cheese. One of the grounds upon which the defendants were defeated as to the alleged counter-claim at the trial was that they could not avail themselves of it, as it belonged to the three purchasers jointly. The answer alleged that the sale of the cheese was to the three as joint purchasers, and that allegation was sustained by the proof. There was no proof showing that there was a separate contract with each purchaser or a separate warranty to, or fraud perpetrated upon, each purchaser. For the convenience of the purchasers, and with the consent of the sellers, the cheese was paid for by the separate notes properly secured of the purchasers, and, after the notes were thus given, there remained no joint

obligation to pay for the cheese, simply because it had been paid for. Payment in this mode, however, did not affect the contract of purchase, or the relation of the parties growing out of the joint purchase. Any claim, therefore, for damages, growing out of the breach of warranty or the fraud, belonged to the three purchasers jointly and could not be used by one of them as a counter-claim. One of them could not have separately sued the plaintiffs to recover such damages, and hence one of them separately cannot set up such damages as a counter-claim under section 150 of the code of procedure. As there was no defense to this note, except by way of counter-claim, Daniel W. Lane was obliged to pay it, and the claim for damages on account of the breach of warrant and fraud could be enforced only by an action in the name of all the purchasers against the sellers. If however, any one of the purchasers refused to join as plaintiff in such an action, he could be made a defendant. We are, therefore, of the opinion that the judgment should be affirmed with costs.

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Judgment affirmed.

for plain.

DEPUY v. STRONG.

3 Keyes (N. Y.), 603. [1867.]

GROVER, J.: The law in this state prior to the enactment of the Code was settled, that tenants in common must all join in an action of trespass to recover damages for injuries to real estate held in common. (Hill v. Gibbs, and cases cited, 5 Hill, 56.) The rule applied to personal and not to real actions. It was founded upon the idea that it was an injury to the possession, and that as the possession of one tenant in common was regarded as the possession of all, the injury was to their joint right, and therefore all must join in prosecuting the remedy. The law having been so determined, it must still be so held unless changed by the legislature. It is claimed that section 111 of the Code has changed the law in this respect. That section provides that every action must be prosecuted in the name of the real party in interest, with exceptions not applicable to the present case. The only change effected by this provision was to enable courts of law to treat assignments of certain choses in action as transferring the legal title, which, at common law,

transferred only the equitable. The rule at the common law was, that the owner of the legal title must sue. Section 119 has (I think) no bearing upon the question in this case. That provides that those united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have joined as plaintiff cannot be obtained, he may be made a defendant; the reason thereof being stated in the complaint. This clearly does not authorize the omission of a party which the existing law required. It is said that it would be incongruous to make one tenant in common a co-defendant with a trespasser, upon his refusal to join as plaintiff. This is so, but the answer is, that that is the only remedy provided by the Code for a case when before if he refused to join as plaintiff, his co-tenant could not maintain an action at all unless the court, upon the special facts, permitted his name to be used as plaintiff. I think it clear that the Code has not changed the law as to the requisite parties in this class of actions. The question arises as to the mode in which the defendant may avail himself of the omission to join a co-tenant as plaintiff. Previous to the Code, this could only be done by demurrer where the defect appeared upon the margin, or in case it did not, by plea in abatement. The latter plea has been abolished by the Code. The only mode provided for presenting a defense being by demurrer or answer, section 144, among other things, provides that a defendant may demur to the complaint when it shall appear upon the face thereof that there is a defect of parties plaintiff or defendant. In the present case, the defect of parties plaintiff did appear upon the face of the complaint. The plaintiffs alleged that they owned an undivided interest in the land. The remaining interest must of necessity have been owned by others, either as joint tenants or tenants in common with the plaintiffs. In either case the co-tenants were necessary parties. One mode of presenting this question, provided by the Code, was by demurring to the complaint. This the defendants interposed. The Special Term erroneously overruled it, and gave the defendants leave to answer. The defendants answered, setting up, among other defenses, the defect of parties plaintiff. This was an abandonment of the demurrer, and placed the case in the same position as though none had been interposed. It remains to inquire whether, in case the defect does appear upon the face of the complaint, it can be made available by answer. This inquiry is answered by section 147. That provides that when any of the

matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer. This clearly implies that when the defect appears upon the face of the complaint, it is available only by a demurrer to the complaint. This being so, setting it up in the answer is a mere nullity. The defendants, instead of answering, should have appealed from the judgment ordered upon the demurrer. It has been repeatedly held by this court that defects of this description must be insisted upon in the mode provided by the Code, or they are waived. (33 N. Y., 43; 32 id. 635.)

The judgment appealed from must be reversed and a new trial ordered. If the defendant has any relief under the peculiar facts of this case, it is by obtaining leave in the Supreme Court to withdraw his answer, and let judgment be entered upon the demurrer.

Judgment reversed.

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BROWN v. WARREN.

16 Nev., 228. [1881.]

Appeal from a judgment non-suiting the plaintiff in an action of ejectment.

LEONARD, C. J.: * * * And lastly, it is urged in support of the non-suit, that if plaintiff has any title or interest in the lands in dispute, he holds the same as tenant in common with Boyle, and that he can not maintain this action without uniting his co-tenant as a party with him. This action, except as to rents and profits, was for the possession only. It can determine no rights but those of present possession. (Mahoney v. Van Winkle, 21 Cal., 583.)

We have no doubt, upon reason and authority, that one tenant in common, who is seized *per mie et per tout*, and has an interest in the whole which entitles him to the enjoyment of the entire estate as against every one except his co-tenants, may maintain ejectment, in this state, against all persons but his co-tenants and parties claiming under them.* (Hart v. Robertson, 21 Cal., 348; Stark v. Barrett, 15 Id., 371; Touchard v. Crow, 20 Id., 162; Williams v. Sutton, 43 Id., 71; Smith v. Starkweather, 5

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*Mattis v. Boggs, 19 Neb., 698; McNear v. Williamson, 166 Mo., 358, accord.

Day, 210.) As to the mesne profits, he can recover, probably, only the proportion corresponding to his interest. (Clark v. Huber, 20 Cal., 196.)

Our opinion is, that the court below erred in granting a non-suit, and the judgment is reversed.

for plain

WHITNEY v. STARK.

8 Cal., 514. [1857.]

This is an action of trover, to recover of the defendants, Stark, as sheriff, and Haile, as execution creditor, the value of two buggies, which the plaintiff alleged had been wrongfully seized and converted, etc.

The defendants justified the taking of the buggies, under an execution, in favor of defendant Haile, and against one Edward H. Cage, alleging that they were the property of Cage, and not of the plaintiff.

On the trial, it appeared that Cage was only the half owner of the buggies, the other part belonging to one Hazelrigg, and that he had only sold his half-interest to plaintiff. At the close of plaintiff's testimony, defendants moved for a non-suit, on the ground of non-joinder. Motion denied, and the defendants excepted.

It further appeared that plaintiff, after his purchase, neglected to remove the buggies, and permitted them to remain in Cage's stables, until they were attached as his property, in the suit of Haile v. Cage. Judgment for plaintiff. Defendants moved for a new trial, which being denied they appealed.

BURNETT, J., delivered the opinion of the court—TERRY, C. J., concurring.

This was an action of trover. The property was levied upon and sold by the defendant Stark, as sheriff, against E. H. Cage. The plaintiff had judgment in the court below, and the defendants appealed.

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The first error assigned by the learned counsel of the defendants is that the court erred in refusing the motion of defendants for a non-suit. It appeared clearly from the evidence of the plaintiff that he was only a part owner of the property—one Hazelrigg having an equal interest with him. All the parties in interest as plaintiffs should be joined. (Pr. Act, secs. 12, 14; 1

Chitty's Plea, 65.) But there are only two ways of taking advantage of the non-joinder, when the defect does not appear upon the face of the complaint, and that is either by answer or apportionment of the damages at the trial. (Pr. Act, secs. 40, 45; 1 Chitty's Plea, 66; 9 Mass., 74; 1 Wend., 380.) In equity the objection should be taken by answer or demurrer. (2 Paige, 280.) Where a part owner brings an action in form, ex delicto, and the objection is not made by plea in abatement, the other part owner may afterward sue alone. (1 Ch. Plea. 66.) In this case, the objection was not made by answer. The non-suit was, therefore, properly refused. * * *

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CABLE v. ST. LOUIS MARINE RAILWAY & DOCK COMPANY.

21 Mo., 133. [1855.]

This was an action by the owners of the steamboat James Hewitt to recover damages for the sinking of said boat by the negligence of the defendant.

At the trial there was evidence tending to show that, at the time of the loss, there was an insurance upon three-fourths of the boat, and that immediately afterward and before the commencement of this suit, the interest insured was by the plaintiffs abandoned to and accepted by the underwriters.

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The defendant asked the court to instruct the jury that, in respect to the interest abandoned, the right of action was in the underwriters alone, and that they should have been joined as plaintiffs; and that, in any event, the plaintiffs could not recover more than one-fourth of the value of the boat. These instructions were refused, and after a verdict and judgment for the plaintiffs for the value of the boat, the defendant appealed to this court.

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SCOTT, Judge, delivered the opinion of the court.

All other questions in this case have been abandoned, except that in relation to the right of the plaintiffs to maintain this action for the entire value of the boat.

There can be no doubt but that the plaintiffs would have been the proper parties to institute this action for the entire sum claimed, had it been brought under our former system of prac-

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tice. Though there had been an abandonment of the subject insured, and that abandonment accepted by the underwriters, yet the action would have been properly brought for the full value of the boat in their names.

It remains, then, to be seen whether, under the circumstances of this case, the action is not properly brought in the name of the present plaintiffs, notwithstanding the present practice act. It is not controverted, but is admitted, that a right of action for a portion of the damages arising from the injury to the subject insured, is in the plaintiffs, and that they have the right to recover the value of one-fourth part of the boat, which was lost through the alleged negligence of the defendant.

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Now, is there anything in the present practice act which affects or in any way impairs the rule of the common law against dividing a cause of action, or making two causes of action out of one contract or injury by a division of it. The endorsee of a bill of exchange is the legal owner of it, and regularly a suit upon such an instrument must be brought in his own name. But if the holder of a bill assign by way of an endorsement one-half of its amount, would not the action, notwithstanding the assignment, still have to be brought in the name of the holder? By our law. the assignee of a bond is the legal owner of it, and suit thereon must be brought in his name. If the obligee of a bond assign one-half of the sum of it, could the assignee, although the legal owner, maintain an action in his own name for his portion of the debt? In such a case, would not the suit necessarily be brought in the name of the obligee, who would recover the full amount due on the instrument?

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A cause of action arising *ex maleficio*, cannot be used as an illustration of this principle, because neither by the common law nor statute was it assignable, so as to enable an assignee to maintain a suit for the damages in his own name.

We do not consider that the provision in the present practice act, which requires actions to be brought in the name of the real party in interest, affects this principle of the common law. Under the former practice, and even now, the legal owner of an instrument transferred by assignment must sue in his own name, yet we have seen that the legal owner of a part of a debt secured by a bond, could not maintain an action on it. It could only be done when he was the assignee of the entire debt. So the statute requiring the real party in interest to sue, should be construed in reference to the principle of the common law

above stated, and must be limited to those cases in which the real party in interest possesses the entire cause of action. The original owner of a cause of action cannot, by parting with a portion of his interest in it, give a right of action to his assignee, neither by the common law nor by anything contained in the present act regulating practice in the courts of justice.

We do not wish to be understood as expressing any opinion as to the matter in which the suit should have been brought had the entire boat been insured by the owners, and they indemnified by their policy.

The other judges concurring, the judgment will be affirmed.

For plain.

WHITE'S BANK OF BUFFALO v. FARTHING.

101 N. Y., 344. [1886.]

ANDREWS, J.: The judgments in favor of the German-American Bank were recovered November 13, 1883, and the deficiency judgment in favor of the banks other than the plaintiff April 4, 1884. The judgment in favor of the plaintiff's bank was recovered February 4, 1884, and this action was commenced November 14, 1884. The several judgments became liens on lands fraudulently conveyed by Matilda Farthing, the judgment debtor, in the order of their docketing, and they could have been sold on executions issued on the judgments. The plaintiff, however, elected to bring its action to remove the alleged fraudulent obstruction created by the conveyances. If it succeeds in establishing the fraud, it will be entitled to a judgment setting aside the conveyances simply, in which case it can proceed to enforce its judgment by a sale of the land on execution, unembarrassed by the cloud created; or the court may proceed further and compel the fraudulent grantees to convey the lands to a receiver, to be sold to satisfy the plaintiff's judgment.

The judgments in favor of the other banks will in no way be affected, whichever form the judgment in this action may take. If it simply sets aside the fraudulent conveyances, the land will remain charged with the liens of the several judgments in the order of their docketing, and the proceedings to enforce them will be regulated by the statute. If it goes further, and

Rule that a party in interest must sue under the act applies on where the party possesses the entire cause of action. Here the plaintiff is the real party in interest. Had only the cause of action

appoints a receiver, and directs a conveyance to him, a purchaser under the receiver's sale will take title as to the time of the debtor's conveyance to the receiver, subject, however, to the judgments in favor of the banks other than the plaintiff. *Chautauqua Co. Bank v. Risley*, 19 N. Y., 369. The result of the plaintiff's action will not, therefore, affect the lien of the judgments in favor of the other banks who seek to intervene in this action.

The plaintiff seeks, also, to charge the Swan street lot with the lien of its judgment, on the ground that Geo. Farthing caused it to be conveyed to Kelley as security for a debt owing by him to Kelley, which has been since paid, and that the judgment debtor, Matilda Farthing, as the devisee of Geo. Farthing, is entitled to the land. The other banks may commence similar actions to reach the Swan street lot, and the plaintiff's action, followed by judgment in accordance with the relief demanded, will not prejudice any rights which the other banks may have to enforce their judgments against it. According to the rules established in this state, judgment creditors holding distinct and several judgments may unite in an action to set aside a conveyance by the common debtor, made in fraud of their rights as creditors. *Brinkerhoff v. Brown*, 6 Johns., Ch. 139. This is a convenient rule, but it is not a rule of obligation, but one conferring authority only. It has never been held that all judgment creditors so situated were necessary parties to such an action. We think section 452 of the code does not require the court, on application, to compel a plaintiff to bring in a judgment creditor, not originally made a party, as a party to an action instituted by him to set aside a fraudulent conveyance, although its power to direct it to be done cannot be doubted. The rights of the creditor not made a party will not be prejudiced by the judgment in that action. A judgment creditor has no title to the land of the judgment debtor, but a lien only, which may, by subsequent proceedings, become the foundation of title; nor has he any interest in the subject matter of the action brought by another judgment creditor, within the meaning of that section. He may have an interest which will be subserved by having the conveyance set aside. But he will not be concluded by a denial of that relief in the action of the other creditor, and, whatever the result of that action may be, his rights and remedies remain as before.

The cases of *People v. Albany & V. R. R. Co.*, 77 N. Y., 232,

and Osterhoudt v. Supervisors, etc., 98 N. Y., 239, cited by the appellant, are not analogous. No effectual judgments could be rendered in those actions without directly cutting off or impairing rights of persons not parties, and it was held, in accordance with the settled rule in equity, that they should be brought in so that there would be a complete determination of the controversy.

We think the order appealed from was discretionary, and that the appeal should, therefore, be dismissed.

All concur.

for plain.

ELDREDGE v. PUTNAM.

46 Wis., 205. [1879.]

Action by Eldredge against Putnam to set aside an account and to have a new one taken, and for judgment for the amount found due by the defendant on such accounting. Defendant interposed a demurrer for defect of parties and for failure to state facts constituting a cause of action. From an order sustaining the demurrer, the plaintiff appeals. Affirmed.

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COLE, J.: The learned counsel for the plaintiff insists that it was error on the part of the court below to sustain the demurrer on the ground that James Patrick was a necessary party plaintiff. At the same time the counsel frankly admits the general rule to be that, in actions to obtain an accounting and settlement of a trust fund, all persons interested in such accounting, and entitled to shares in the distribution, are necessary parties; but he claims that the facts stated in the complaint bring the case within one of the well-recognized exceptions to that rule. An exception is, that, where each beneficiary is entitled to an aliquot part, such as a quarter or a half of an ascertained and definite trust fund, each may sue for his portion, as was done in Hubbard v. Burrell, 41 Wis., 365, without making the other beneficiaries parties. Such, he says, is the case at bar. But Hubbard v. Burrell is quite distinguishable from this case. There no accounting of the trust fund was necessary, and no such relief was demanded in the complaint. The decision proceeds on the ground that the trustee held a definite and ascertained sum for the plaintiff, and that James Hubbard had no interest in the subject-matter of the suit. It was there-

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fore, said in the opinion that there was no reason why the plaintiff could not have a separate action to recover his share held by the trustee. According to the complaint, the plaintiff's assignor, Erwin Evelith, and James Patrick were to receive, as payment for their services in examining and locating the lands described for the defendant and William S. Patrick, one-eighth of the proceeds of the sales of such lands, less one-eighth of all taxes and interest paid on the same while held by the defendant and William S. Patrick. It is stated that by an agreement between Evelith and James Patrick for the lands which were examined and selected by them jointly, each was to receive an undivided one-sixteenth of such sales; while for those which each separately examined and selected, the party so selecting was to receive the entire one-eighth. The number of acres selected by each separately, and by Evelith and Patrick together, is stated. It further appears that all the lands were sold by William S. Patrick, in whom the legal title was vested for that purpose, for the joint benefit and profit of himself and the defendant; and the price received per acre on such sales is alleged. It does not appear, however, that there was ever any accounting and settlement of these various transactions between the defendant and William S. Patrick, though it is stated that the latter died in Pennsylvania in January, 1877, leaving the defendant the sole surviving promisor and trustee under the written acknowledgment of trust set forth in the complaint. The plaintiff then alleges, upon information and belief, that during the year 1877, and before the commencement of this suit, the defendant herein fully accounted to and with and fully paid and satisfied the said James Patrick for all money, claims, and demands due, owing, and belonging separately and individually to him, the said James, by reason of the matters and things set forth. It is further averred that, in the autumn of 1873, William S. Patrick rendered to the plaintiff a false, imperfect, and partial account of the sales made by him, from which it appeared that the separate share of the plaintiff, computed according to the price per acre given, was about the sum of \$1,300, only about \$85 of which has ever been paid. It is then stated that the plaintiff did not learn until after the death of William S. Patrick that this accounting was false and fraudulent; and it is averred that he has not since assented to nor acquiesced in such accounting. It is alleged that at divers times while the defendant and W. S. Patrick were the owners of the

lands, certain taxes were paid by them, but at what times or to what amounts, the plaintiff is unable to state, except that the sum of \$14.62 was paid by them for the taxes of 1872. The relief asked is that the partial, imperfect, and fraudulent accounting be set aside and held of no effect; and that an accounting may be had between the plaintiff and defendant of all the sales and adventures in said lands, and of and concerning the profits, proceeds, and receipts of the same, and the whole thereof; and that, after deducting such sums, as should of right be deducted in the premises, the plaintiff may have a judgment against the defendant for such sum as shall, on such accounting, be found due him for his individual and separate share of the purchase money received by William S. Patrick and the defendant, or either of them.

We have thus given at some length the more material parts of the complaint, in order to show the purpose and scope of the action. It will be seen that the object of the suit is to set aside the alleged fraudulent settlement or accounting made with the plaintiff by W. S. Patrick in 1873, and for a general accounting of the sales and profits from all the lands, as well as those selected by Evelith and James Patrick together, as those selected by each separately. All these various matters have to be examined, and the amounts of the taxes paid by the owners, with the interest thereon, have to be ascertained and adjusted. How it can be successfully maintained that James Patrick is not interested in these matters, and is not a necessary party to the account to be taken, it is difficult to understand. The defendant may well insist that, if all these transactions are to be inquired into and overhauled, James Patrick should be before the court, so that the accounting should be final. At all events, it would seem clear that the facts do not show that the plaintiff is entitled to a certain share of a fixed and definite trust fund, so as to bring the case within the rule of *Hubbard v. Burrell*, and that class of cases. On the contrary, the presence of James Patrick would seem to be absolutely necessary to taking the account and granting the relief asked. No question is made as to the necessity of making the legal representative of W. S. Patrick a party, though there would seem very cogent reason for doing so. W. S. Patrick was the party who made the alleged fraudulent settlement with the plaintiff, and it does not appear that the defendant was privy to or connected with that fraud, except that it may be presumed he was benefited by it,

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as he and William jointly shared in the profits of the speculation. However, we express no definite opinion on the question whether the legal representative of W. S. Patrick should be before the court, since no point was made upon it in the argument. But as to the necessity of making James Patrick a party, in view of the relief sought, we are clear that he should be brought in. But it was further said that the complaint shows that James Patrick's interest in the fund has wholly ceased, and therefore that he need not be made a party. We have referred to the allegation that the defendant had fully accounted with and fully paid James Patrick for all moneys, claims, or demands due and owing to him separately and individually. A question was made whether this averment was intended to embrace matters in which James Patrick was jointly interested with the plaintiff, or whether it did not exclusively refer to such lands as he alone examined and selected, and for which he was to receive the entire one-eighth of the proceeds. But, giving to the allegation its widest scope, we think that it does not dispense with the necessity of making James a party to the general accounting. We have already sufficiently stated our reasons for that view, and need not repeat them. The counsel for the plaintiff referred us to a number of cases which decide that when a party answerable in contract to two jointly, settles with one of them, so that one of them has no longer any interest in the matter in dispute, it amounts to a severance of the cause of action, and the debtor is liable in an action at law to the other alone. This doctrine was recognized or acted upon in *Strohn v. Insurance Co.*, 33 Wis., 648; *Carrington v. Crocker*, 37 N. Y., 336, and *Boston & M. R. R. Co. v. Portland, etc.*, R. R. Co., 119 Mass., 498. But the doctrine of these cases does not apply here, where a full accounting is sought in equity. There the invariable rule is that all interested in the account are necessary parties, either plaintiffs or defendants. It follows from these views that the order of the circuit court must be affirmed.

for def.

LILLY v. TOBEIN.

103 Mo., 477. [1890.]

BLACK, J.: * * *

To the original petition filed in this cause the defendants demurred, on the ground, among others, that the unincorporated church society had no power or legal capacity to sue. The demurrer was sustained, and thereupon an amended petition was filed, adding as plaintiffs, John J. Lilly, Michael Howell, Patrick O'Malley, and Thomas Clark, members of, and alleged to be trustees of, the church. These persons sue for themselves and all other members of the association. The amended petition also names one hundred or more persons, members of the church, as additional plaintiffs. To this amended petition the defendant demurred, and this demurrer was sustained as to the unincorporated association, but overruled as to the new plaintiffs brought in by the amended petition. * * *

3. The statute allows "any person interested in the probate of the will" to prosecute a suit to contest the same, or to have one proved which has been rejected by the probate court. Assuming that the church is capable of suing, the fact that it is by the will made a devisee gives to it an interest which entitles it to prosecute this suit. The question then arises whether that interest can be represented by the present plaintiffs.

It appeared in the former suit, as it does now, that, at the death of the testator, the Catholic Church, at Lexington, was simply an unincorporated religious association. Thereafter, the members of the church organized as a corporation, and that suit was instituted by the incorporated association. It was held that the incorporation of the plaintiff did not vest in it the property rights of the church society, and for that reason the plaintiff could not maintain the suit. Trustees of a charity are often incorporated for the purpose of executing the trust, and, since the church society was doubtless incorporated to enable it the better to protect the devise in question, the correctness of the conclusion reached in that case, as to the rights of the corporation to prosecute the suit, may well be doubted. It was, however, held in that case, and we think correctly held, that the church society did not lose its existence, or become wholly merged in the corporation.

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be established in this state, except such as may be created under a general law for the purposes only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages, and cemeteries." Art. 2, sec. 8. As a church can only be incorporated for the specified purposes, it was held that the church organization for religious purposes must continue after incorporation. In view of an intimation then made, this suit was commenced in the name of the unincorporated society, but a demurrer to the petition was sustained because of the want of capacity in the plaintiff to sue. It is now insisted that Lilly, O'Malley, Howell and Clark, who were made parties plaintiff by the amended petition and who are members of the church and sue for themselves and all other members of the association cannot prosecute this suit.

Equity rule { It is a well-established rule in equity pleading that one or more of the members of a voluntary association, whether organized for public or for private purposes, may sue for and in behalf of all the members. Story Eq. Plead. (9 Ed.), secs. 94 and 114a. The right of a few persons to sue for themselves and all other persons similarly situated has been recognized by this court on several occasions: 52 Mo., 81; 67 Mo., 203. It is true that this is an equity rule, and we have no statute extending it to actions at law, as is the case in some of the states. It has also been said in several cases that a suit to contest a will, or to establish one which has been rejected by the probate court, is an action at law. Lyne v. Marcus, 1 Mo., 410; Swain v. Gilbert, 3 Mo., 347; Young v. Ridenbaugh, 67 Mo., 574; McIlraith v. Hollander, 73 Mo., 112. Such a suit is doubtless one at law in the sense that it is a statutory proceeding. But this court said in the case of Eddie v. Parke's Ex'r, 31 Mo., 513, which was a suit to contest a will: "Although this is technically a proceeding at law, yet in many respects it partakes of the nature of a proceeding in chancery, and the rules recognized in courts of equity, with respect to the persons necessary to be made parties to a bill, we think, is to a great extent applicable to a case of this kind." Looking to the parties who should be brought before the court, the method of making up and submitting the issue of will or no will, and the character and form of the judgment, we can but conclude that a suit to contest or establish a will has many of the features of a suit in chancery; and the equity rule allowing one or more members of a voluntary association to sue for all should be applied to cases like the one in hand.

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It results from what has been said that it is a matter of no consequence that some of the other named plaintiffs have died or ceased to be members of the church, or are minors or married women. They may be disregarded as unnecessary parties. * * *

Judgment affirmed.

for plain.

Section 3. Joinder of Defendants.

CODE PROVISIONS: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party defendant, for the complete determination or settlement of a question involved therein, except as otherwise expressly prescribed in this act. In any action brought, affecting real estate upon which the people of the state of New York have or claim to have lien, under the transfer tax act, the said people of the state of New York may be made a party defendant, in the same manner as a private person. In such a case the summons must be served on the attorney general, who may appear in behalf of the people."—*N. Y. Code Civ. Proc. Sec. 447.*

See, also Sec. 448, *ante*, p. 212.

Two or more persons, severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over to him; may, all or any of them, be included as defendants in the same action, at the option of the plaintiff.—*N. Y. Code Civ. Proc. Sec. 454.*

"Any person may be a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And in actions to recover possession of real estate, the landlord and tenant thereof may be joined as defendants, and any person claiming title or a right of possession to real estate may be made a party plaintiff or defendant, as the case may require, to any such action."—*Mo. R. S. 1899, Sec. 543.*

See, also Sec. 544, *ante*, p. 212.

"Every person who shall have a cause of action against sev-

eral persons, including parties to bills of exchange and promissory notes, and who shall be entitled by law to one satisfaction therefor, may bring suit thereon jointly against all or as many of the persons liable as he may think proper; and he may, at his option, join any executor or administrator or other person liable in a representative character, with others originally liable."—*Mo. R. S. 1899, Sec. 545.*

"In cases of joint obligations and joint assumptions of co-partners or others, suits may be brought and prosecuted against any one or more of those who are so liable."—*Mo. R. S. 1899, Sec. 892.*

(a) *Parties Who May be Joined.*

PHILLIPS v. FLYNN.

71 Mo. 424. [1880.]

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This was a suit for rent against defendant Blackburn. Flynn was joined as a co-defendant. The petition averred that he had purchased of Blackburn the crop raised on the demised premises; that the purchase was made with full knowledge that it had been so raised, and that plaintiff's rent was not paid, and that plaintiff was, therefore, entitled to a landlord's lien upon the crop. It further averred that Flynn had sold and shipped the crop, so that the lien could not be specifically enforced. There was a prayer for a general judgment against Blackburn, and a prayer that Flynn be required to pay plaintiff out of the proceeds of the sale the amount of such judgment. To this petition Flynn filed a demurrer, which having been overruled, he refused to plead further, and after a trial and verdict against Blackburn, a judgment was entered against both, from which Flynn appealed.

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SHERWOOD, C. J. The objections of the demurrant Flynn to the petition, were well taken for these reasons: 1st, The petition united in the same count two distinct causes of action, one arising *ex contractu*, the other *ex delicto*. 2d, Two distinct causes of action not belonging to the same class, were united in the petition. 3d, There was an improper joinder of parties defendant, Blackburn, who was declared against on a breach of contract, and Flynn for a tort. It is unnecessary to notice the other errors assigned. Judgment reversed and cause remanded. All concur.

for def.

TROWBRIDGE v. FOREPAUGH.

14 Minn. 133. [1869.]

Appeal from an order of the court of common pleas, Ramsey county, sustaining a demurrer to the complaint.

The action is against Joseph L. Forepaugh, and Monroe and Romaine Shiere, and the city of St. Paul, for an injury caused by plaintiff falling into a hole on Third Street, in St. Paul, across the front of defendant Forepaugh's lot. The complaint alleges the excavation of the hole by the defendants Forepaugh and the Shieres, and that they willfully and negligently left it open without protection or notice, and that plaintiff fell into it and was injured. It alleges the duty of the city to keep the streets and sidewalks in repair, free from obstructions, and in suitable condition for use and travel, notice to it, and that it suffered the hole to remain without protection or notice. The defendants, other than the city, demurred for an improper joinder of causes of action.

WILSON, C. J. The liability of the city depends on a state of facts not affecting its co-defendants; and the converse. Neither is in fact nor in law chargeable with, or liable on account of, the matter set up as a cause of action against the other. [They did not jointly conduce to the injury by any acts either of omission or commission]

Under such circumstances we find no case holding that a joint action is maintainable; and we are of the opinion that it is unauthorized by any statute or legal principle. Our statute, which is merely declaratory of the common law, forbids the joinder of causes of action, which do not affect all the parties to the action. Gen. Sts. c. 66, § 98. For such improper joinder of causes of action any defendant may demur. There is nothing in the statute, and we discover no reason, requiring all the defendants to join in such a demurrer.

Order affirmed.

for def.

SIMMONS v. EVERSON.

124 N. Y. 319. [1891.]

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Appeal from a judgment of the general term of the fourth judicial department, affirming a judgment entered on the decision of the circuit court.

The trial court found that for many years prior to October 18, 1887, the appellants owned in severalty, three lots, each being 22 feet wide, and bounded on the east by the center line of South Salina street in the city of Syracuse. The south lot was owned by the defendant Lynch, the middle one by the defendant Pierce, and the north one by the defendant Everson. On these lots stood three brick stores, separated from each other by brick partition walls extending from the foundations to the roofs. A continuous brick wall of uniform height (about sixty feet) and thickness stood adjacent to the west line of the street, and formed the front of the buildings. The partition walls and the front wall were interlocked, or built together. On the date mentioned the three stores were substantially destroyed by fire, nothing being left standing except the front wall, a part of the partition walls, and a small part of the woodwork in the front of Everson's building. Shortly after this event the front wall began to lean towards the street, and continued to incline more and more in that direction until Nov. 17, 1887, when it gave way near the point where it was united with the partition wall between the buildings of Lynch and Pierce, carrying down the entire front and part of both partition walls. Material from the part of the front wall, standing on the lots of Pierce and Everson, and from their partition wall fell on and killed the plaintiff's intestate, who was lawfully on the sidewalk near the boundary between their properties. No part of the walls on Lynch's lot fell on decedent. It was found that immediately after the fire the front and part of the partition walls became weak, unsafe, dangerous, and liable to fall into the street, and that each of the defendants was careless and negligent in not removing or supporting the walls on his own lot, and that the several neglects of the defendants united and directly caused the walls to fall. It was further found that these walls were so unsafe that they were a public nuisance, and also that the decedent did not negligently contribute to the accident or to his own death. The damages were assessed at \$5,000.

FOLLETT, C. J. (after stating the facts as above): It is urged in behalf of the defendants that at most this is but a case of several independent acts of negligence committed by each, the joint effect of which caused the accident, and for which they are not jointly liable within the rule laid down in *Shipman v. Palmer*, 77 N. Y. 51. The case at bar does not belong to the class of actions arising out of acts or omissions which are simply negligent, and, while the defendants did not intend by their several acts to commit the injury, their conduct created public nuisance, which is an indictable misdemeanor under the statutes of this state (Pen. Code, §§ 385, 387; *Vincent v. Cook*, 4 Hun. 318;) and at common law (Reg. v. *Watts*, 1 Salk. 357; Reg. v. *Watson*, 2 Ld. Raym. 856; 1 Russ. Crimes, 5th edition 423; 2 Whart. Crim. Law, § 1410; Bigelow, Torts, 237; Pol. Torts, 2nd ed. 345; Steph. Dig. Crim. Law, art. 176; Indian P. C. § 268). Persons who by their several acts or omissions maintain a public or common nuisance are jointly and severally liable for such damages as are the direct, immediate, and probable consequence of it. *Irvine v. Wood*, 51 N. Y. 224, 230; *Slater v. Mersereau*, 64 N. Y. 138; *Timlin v. Oil Co.*, 7 N. Y. Supp. 158; *Klauder v. McGrath*, 35 Pa. St. 128; 1 Shear & R. Neg. (4th ed.) § 122; Pol. Torts, (2nd ed.) 356. The fall of these four-story brick walls, into the street was the direct and immediate consequence of the several acts of the defendants in suffering the portions standing on their own lots to remain unsupported after they had begun visibly to incline towards the street, and it was as obvious before, as it was after the accident, that if any part of the front wall fell, a large part of it must, and that it would go into the street. The judgment should be affirmed, with costs. All concur, except VANN, J., not voting.

This is not merely a case of negligence

It is a case of public nuisance, & the parties are jointly & severally liable.

for plan

COOPER v. BLAIR.

14 Ore. 255. [1886.]

THAYER, J. The appellant commenced an action in the court below against the respondents to recover damages for an alleged conversion of a quantity of wheat which the appellant had stored with the respondent Blair at Corvallis, Benton County, Oregon. Blair had two warehouses, in which he received wheat for storage, and dealt in buying and selling wheat. He received

from appellant 833 bushels, Oct. 25, 1882, at his warehouse, on First Street, Corvallis; 416 $\frac{7}{60}$ bushels, at same warehouse, Sept. 19, 1885; and at or about that time received from him 716 $\frac{46}{60}$ bushels at same warehouse. A part of the wheat so stored the appellant subsequently sold to Blair. He alleges that he had 1,365 bushels and some pounds of wheat after the sale to Blair, which he charged the respondent with having converted. The respondents, the Salem Capitol Flouring-mill Company, Limited, J. E. Henkle, Jacob Henkle, and John Kitson, and W. B. Hamilton, Zephin Job, and B. R. Job, answered separately; that is, the flouring-mills company filed its answer; the Henkles and Kitson, who were partners, filed their answer jointly; and Hamilton and Zephin and B. R. Job, who were also partners, filed their answer jointly. The said respondents in their said several answers denied the main allegations of the complaint, and set up certain new matter. The flouring-mills company alleged that they purchased and paid full cash value for all of the wheat they received, or that came into their possession, at or about the time of the alleged conversion. Henkle & Co. alleged that they were the owners of a quantity of wheat which had been stored in said warehouse; that it was mixed in bins with other wheat of like grade and quality, with the assent of the owners thereof; and that they took only 2,800 bushels of wheat, which was a less amount than that stored therein belonging to them, and which was delivered to them by said Blair. And Hamilton & Co. alleged that they were the owners of about 13,132 bushels of wheat, which had theretofore been stored in said warehouse, mixed as Henkle & Co.'s wheat was, and that Blair delivered the same to them; which wheat, so received by the respondents, was alleged in the several answers to be the wheat they were charged with having converted. The said Blair filed no answer to the complaint.

Upon the trial of the action the respondents' counsel contended that there could be no recovery against the respondents unless the alleged conversion of the wheat was their joint act, and the circuit judge who presided at the trial seemed to be of that opinion, as he finally non-suited the appellant apparently upon the ground that the respondents' acts in the premises were several; that is, the flouring mills company acted for themselves; Henkle & Co. for themselves, and Hamilton & Co. for themselves. The theory of the appellant's counsel seems to have been that they had a right, after proving the amount of wheat

appellant had in the warehouse at the time of the alleged conversion, to show how much the flouring mills company took out of it, how much Henkle & Co. took out of it, and how much Hamilton & Co. took out of it; and, after ascertaining what portion of the wheat so taken belonged to him, recover from said several companies the amount taken by them, respectively, of his wheat.

It must be conceded, I think, that these several companies acted independently of each other in what they did in regard to the taking of the wheat. There is not the slightest trace of testimony in the case, as I can discover, that they combined or cooperated in taking away any wheat from the warehouse in question. The taking was at different times, and was clearly several acts, and resulted from their several motives. Each company took the wheat they supposed they were severally entitled to, and at their own instance, and upon their own responsibility; and, unless the appellant's counsel can maintain the theory before indicated, the non-suit granted by the circuit judge must stand. There were a number of exceptions taken to the ruling of the judge at the trial in excluding testimony offered upon the part of the appellant; but they are unimportant, unless the appellant had the right to recover severally against the respondents, as before indicated.

The view the appellant's counsel suggested in reference to this question seems hardly tenable; yet it has been presented with much force and ability, and is sustained by many of the earlier decisions. *Jackson v. Woods*, 5 Johns. 278, and cases there cited. That was a case of ejectment against five defendants, who entered into the consent rule jointly, and pleaded jointly. Two of the lessors of the plaintiff proved title to the premises in themselves, and that the defendants were in possession in separate and distinct parts, but not jointly. The jury found each defendant separately guilty as to that part of the premises in his separate possession, and not guilty as to the other parts possessed by the other defendants; and the court held that the plaintiff was entitled to judgment against all the defendants severally according to the verdict. Kent, who was then chief justice of the court, laid it down as a rule in actions for torts against several who joined in the plea that the jury might find some guilty of part, or at one time, and the other guilty of another part, or at another time, and that in either

of those cases they might assess several damages; and referred to several early English cases that sanctioned such course.

The case is very similar in principle to that of *Jackson v. Hazen*, 2 Johns. 437. There the action was against five defendants, who entered into the consent rule jointly, and pleaded jointly; but it appeared upon the trial that two of them occupied distinct parcels of the premises in severalty, and that the other three possessed the residue of the premises jointly. Ford, for the plaintiff, contended that all the facts necessary to be proved in an action for trespass were admitted by the consent rule, and that the defendants could have prevented the difficulty and hardship that might arise out of a claim to the mesne profits by appearing separately for their distinct parcels; but the court held that the plaintiff was bound to prove a joint possession of all the defendants, and that the two defendants who held separately were entitled to judgment against the plaintiff. SPENCER, J., who delivered the opinion of the court, said that the only case which seemed to warrant a general judgment against all the defendants was that of *Claxmore v. Searle*, 1 Ld. Raym. 729, which stated the practice to be, where some of the defendants appeared at the trial and confessed lease, entry, and ouster, and the others did not, that with regard to such as did not appear, a verdict was to be entered for their not appearing to confess, etc.; but the court held that this rule did not proceed upon the principle arising in the case; nor did it necessarily follow that the rule contemplated distinct possession as to those who did not confess; that in many respects there was an analogy between actions of ejectment and trespass, and perhaps in all respects, except as to the quantity of interest necessary to maintain the one or the other; that, in an action of trespass against several, it would not be competent for the plaintiff to give in evidence the distinct acts of the individuals, without showing also that such acts were in performance of a concert and agreement among all the defendants. Then, and in that case only, would all be responsible for the act of each. In this view Chief Justice KENT and VAN NESS, J., concurred.

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These two cases have been referred to in subsequent decisions of the New York courts, but have never been cited except in ejectment proceedings as they were conducted at common law; and all that is said by the court in either of them is only authority in ejectment suits as formerly prosecuted. The doctrine those cases attempted to establish was evidently intended to

soften the rigor of the rules in ejectment cases. A strict enforcement of them left the defendant no grounds to stand upon except to defeat the lessor's claim of title to the premises, as he was compelled to confess the leasing, entry, and ouster as a condition upon which he was permitted to defend. This, however, operated as no hardship, except where the action was against several, each occupying distinct parcels of the demanded premises. In that case, if the fiction of law applicable to that class of actions were carried out literally, the defendants would each have to confess, or be deemed to have confessed, the ouster as to the whole, and be liable to the whole amount of the mesne profits; and to avoid so palpable an injustice it was necessary either to compel the plaintiff to enter into a separate consent rule with each defendant, or not allow a recovery without proving a joint possession of all the defendants, as in *Jackson v. Hazen*, or by allowing a finding of guilty against each defendant separately as to the part of the premises in his separate possession, and not guilty as to the balance, as in *Jackson v. Woods*. It was only an expedient adopted to prevent injustice; and, in order to preserve consistency, I imagine, Chancellor Kent, in the latter case, cited the authorities in *Cro. Car.*, and the case in the exchequer chamber, and in 11 *Coke*, and from *Tidd, Prac.*; for I very much doubt that that distinguished jurist would ever have decided, as an abstract question, that parties severally committing distinct trespasses could be united in an action, and several judgments be recovered against them. Whatever may have been the rule upon the subject in the English courts, no such practice ever obtained in the United States, unless under special statutory provision. Nor do I believe that the later English authorities recognize any such doctrine.

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Chitty says: "And, if a joint action of trespass be brought against several persons, the plaintiff cannot declare for an assault and battery by one, and for the taking away of goods by the others, because these trespasses are of several natures. And in trover against several defendants all cannot be found guilty in the same court without proof of a joint conversion by all." 1 *Chit. Pl.*, 86. And it is declared in note "i" to the case of *Wilbraham v. Snow*, 2 *Saund. pt. 1 p. 47*, in these words: "It is plain that several defendants cannot be found guilty in trover without evidence of a joint conversion. Therefore, where bankrupts and their assignees were joined as defendants in an action of trover, and a verdict passed against all the defendants

upon evidence that the bankrupts, before their bankruptcy, had converted the goods of the plaintiff by pledging them without authority, and that the assignees, after the bankruptcy, had refused to deliver them up on demand, the court held that the conversions were separate, and granted a new trial for want of evidence of a joint conversion;" citing *Nicholl v. Glennie*, 1 Maule & S. 588. In *Add. Torts*, §1321, the same rule is declared, and same reference made to 1 Maule & S. 588. The author further remarks in that section that, "where an action has been brought against several joint trespassers, the evidence must be confined to the joint offenses in which all are implicated." Mr. Pomeroy in his work on Remedial Rights and Remedies, in section 308, after stating, in the previous section, that those who have united in the commission of a tort to the person or the property, whether the injury be done by force, or be the result of negligence or want of skill or of fraud and deceit, are generally liable to the injured party without any restriction or limit upon his choice of defendants against whom he may proceed, says: "In order, however, that the general rule thus stated should apply, and a union of wrongdoers in one action should be possible, there must be some community in the wrongdoing among the parties who are to be united as co-defendants. The injury must in some sense be their joint work. It is not enough that the injured party has, on certain grounds, a cause of action against one for the physical torts done to himself or his property, and has, on entirely different grounds, a cause of action against another for the same physical tort. There must be something more than the existence of two separate causes of action for the same act or default to enable him to join the two parties liable in the single action." This principle, he there says, is of universal application. In *Forbes v. Marsh*, 15 Conn. 384, the court held that, "where the plaintiff in an action of trover against B and C, introduced evidence proving a conversion by B only, without the participation or knowledge of C, that it was not then competent to prove a distinct conversion by C."

This was the predicament the appellant found himself in at the trial of this case. He had joined the three parties, the flouring-mills company, Henkle & Co., and Hamilton & Co., in a single action, and then attempted to introduce evidence proving a conversion by one of them only. He could only be permitted to prove an act of conversion upon the part of one of the parties under an offer to show that the others participated in

the act in some way; and, unless he could make such showing, he would be confined to his claim against the one party. Or he might have been permitted to show that all the parties took and carried away the wheat at different times, under an offer to show that there had been a combination entered into between them for that purpose; and, if he failed to show the common purpose, he would have had to submit to a non-suit unless the court permitted him to amend his complaint, and proceed against one of the parties. Section 99 of the Civil Code is broad enough, I think, to have allowed such an amendment; but to attempt to proceed against the respondents jointly on account of a several liability is not warranted by law in such a case as this was. We virtually held that in *Dahms v. Sears*, 11 Pac. Rep. 891 (recently decided by this court). The difficulty in this class of cases has been in attempting to apply the general rule that torts are joint and several, and that in a joint action against several defendants one or more may be found guilty, and the others acquitted; but in the class of cases to which that rule applies, as was said by Judge Dillon, in *Turner v. Hitchcock*, 20 Iowa, 316, the injury sued for is an entirety. "The injury is single, though the wrongdoers may be numerous." It has no application to a case where distinct injuries have been committed by the several defendants. If B were to go to A's barn, and unlawfully carry away 10 bushels of his wheat, and C, in like manner, were to go at another time, and carry away 30 bushels more, and there had been no concert of action between them in the matter, but each had acted for himself, it would be absurd to sue them together in one action for the conversion of the amount of wheat so taken. Yet this is the position the appellant occupies in the case at circuit, and he either had to confine his proof to one of the acts, and to the party committing it, or obtain leave of the court to amend his complaint after the proof disclosed the dilemma he was in, or submit to a nonsuit. There could have been only one recovery in the case, and that had to be against the party or parties who did the act for which it was obtained.

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In *Currier v. Swan*, 63 Me. 323, in an action of trespass for an assault against four parties, the jury rendered a verdict in regular form against them all, but appended to it an apportionment of the damages among them severally. The court held that the appended part must be rejected; that but one verdict could be rendered, and that, therefore, the damages must be joint, and not several; that the question was, what damages had the plain-

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tiff sustained? and that for these, whatever they were, all the participants in the assault were liable; that there were no degrees of guilt; and referred to several Massachusetts cases as sustaining that view. And in Sutherland on Damages it is said that "the extent of individual participation in, or of expected benefit from, a joint tort, is immaterial; each and all the tortfeasors are liable for the entire damage." 1 Suth. Dam. 211.

We think the judgment of the circuit court should be affirmed.

for def.

GREENBERG v. WHITCOMB LUMBER CO.

90 Wis. 225. [1895.]

NEWMAN, J. (after stating the facts): The complaint states, in substance, that the defendant the Whitecomb Lumber Company is a corporation; that the defendant Parlan Semple was one of its officers and its general managing agent; that its business was the manufacturing of timber into firewood; that it operated, in this work, a machine which was defective and dangerous; that it knew the machine to be defective and dangerous; that the defect which rendered it dangerous was that the saw was defectively and insecurely fastened to its shaft; that the plaintiff was employed to work upon or with this machine; that he was inexperienced in such work and as to such machine, and did not know of the defect of the machine; that the defendants knew that he was so inexperienced and ignorant; that plaintiff received no instructions; that he was injured, without his fault, by reason of the defect of the machine. Fairly construed, this is the substance of the complaint. It was the duty of the defendant the Whitcomb Lumber Company to furnish the plaintiff a safe machine to work with, and, knowing the defect of the machine and that he was inexperienced, to instruct him of the dangers of the employment. Not to do this was negligence. The complaint states a cause of action against the defendant the Whitcomb Lumber Company.

Whether the complaint states a cause of action against the defendant Parlan Semple is more complex. He was the agent or servant of the Whitecomb Lumber Company, charged with the oversight and management of its operations, and with the duty of providing a safe machine for the work in which the plaintiff

was engaged. The principle is well settled that the agent or servant is responsible to third persons only for injuries which are occasioned by his misfeasance, and not for those occasioned by his mere non-feasance. Some confusion has arisen in the cases, from a failure to observe clearly the distinction between non-feasance and misfeasance. These terms are very accurately defined, and their application to questions of negligence pointed out, by Judge Metcalf in *Bell v. Josselyn*, 3 Gray (Mass.) 309. "Non-feasance," says the learned judge, "is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; malfeasance is the doing of an act which a person ought not to do at all." The application of these definitions to the case at bar is not difficult. It was Simple's duty to have had this machine safe. His neglect to do so was non-feasance. But that alone would not have harmed the plaintiff, if he had not set him to work upon it. To set him to work upon this defective and dangerous machine, knowing it to be dangerous, was doing improperly an act which one might lawfully do in a proper manner. It was misfeasance. Both elements, non-feasance and misfeasance, entered into the act, or fact, which caused the plaintiff's damages. But the non-feasance alone could not have produced it. The misfeasance was the efficient cause. For this the defendant Simple is responsible to the plaintiff. *Meehem*, Ag. sec. 569 *et seq.*; 14 Am. & Eng. Enc. Law, 873, and cases cited in note 4; *Wood, Mast. & Serv.* (2d Ed.) 667; *Osborn v. Morgan*, 130 Mass. 102. The complaint states but a single cause of action. It is the same cause of action against both defendants, arising from the same acts of negligence,—the master for the negligence of its servant; the servant for his own misfeasance. Both master and servant, being liable for the same acts of negligence, may be joined as defendants. *Wood, Mast. & Serv., supra*; *Wright v. Wileox*, 19 Wend. 343; *Phelps v. Wait*, 30 N. Y. 78. The order appealed from by the Whitcomb Lumber Company is affirmed, and the order appealed from by the plaintiff is reversed.

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for plain.

SUTTON v. CASSELEGGI.

77 Mo. 397. [1883.]

MARTIN, C. This was an action of ejectment, commenced on the second day of November, 1873, to recover a parcel of ground on Third street in Block 63 of the City of St. Louis, containing a front of thirty-two and a half feet on Third street, by a depth of fifty-four feet. The defendants filed separate answers, putting in issue the plaintiff's title, and denying all joint possession or occupancy, and setting up the defence of the statute of limitations. Pauline Dalton, in her answer, avers that she is the owner of the lot of ground; that she rented the south half to Casseleggi, and the north half to Dolan, her co-defendants, who were in possession as her tenants at the beginning of the suit, and still are in possession as such tenants. The replication puts in issue the new matter of the answers, and contains a denial of ownership in said Pauline to any interest exceeding one-third thereof. The case was tried by the court without the intervention of a jury, and resulted in a judgment for plaintiff for an undivided one-eighth of the lot sued for, and for \$1 rents and profits, and \$1 monthly value. Both parties appealed to the St. Louis Court of Appeals. The judgment was there affirmed in all things. See 5 Mo. App. 122. From this judgment of affirmance the plaintiff has appealed to this court, and the errors, if any, made against him, come before us for correction. The defendants have abided with the decision of affirmance, and have prosecuted no appeal. * * *

* * * The plaintiff insists that he was entitled to a judgment for the admitted rents and profits, and that the court erred in rendering a judgment for only nominal damages. This point is not noticed in the decision of the court of appeals.

An action in ejectment must be brought against the actual occupant of the property. The landlord of the occupant is not a necessary party. Our statute permits him to come in and defend. It has been said that he possessed this right at common law, prior to any statute. *Fosgate v. Herkimer Manufacturing Company*, 12 N. Y. 580. The plaintiff sues the defendants, alleging them to be in joint possession. In their answers they deny the averment of joint possession. Dolan pleads that he is in the sole possession of the north half of the lot, and has no possession of the south half. Casseleggi pleads that he is in sole

possession of the south half, and has nothing to do with the north half. Pauline Dalton pleads that she is not in actual possession of either parcel, but that she rented the north half to Dolan, and the south half to Casseleggi, who occupy as her tenants. The evidence developed at the trial shows that these pleas were literally true. When this fact was developed it was apparent the plaintiff had made a misjoinder of parties defendant. Distinct actions ought to be brought to recover distinct and separate possessions. Keene v. Barnes, 29 Mo. 377; Walsh v. Varney, 38 Mich. 73; Fosgate v. Herkimer Manufacturing Co., 12 N. Y. 585. The plaintiff ought not to have been allowed to proceed with two distinct actions of ejectment in one. It not appearing in the petition, the defendants cannot demur for the misjoinder.

It seems to me the defendants brought the matter up properly in an instruction that the plaintiff could not recover as long as he persisted in proceeding in this way. But Judge Scott intimates in Keene v. Barnes, that the proper method of taking advantage is by motion to compel the plaintiff to elect as to which cause of action he will proceed with. The instruction that plaintiff could not recover ought to have been treated, to say the least, in the nature of a motion to elect. The instruction was refused and judgment went for plaintiff, but for only nominal damages.

The error of this practice, as it stands on the record, is not a material one against the defendants, as to the recovery of possession from them. Whether their possession is joint or several, the single writ for possession will be the same thing against them in effect as if two writs issued, one against each. Neither is called upon to respond for rents and profits received by the other. No substantial injustice can accrue to them by reason of this error of the proceeding. But when the plaintiff asks for a joint judgment against them for rents, the injustice at once appears. Dolan would be paying the damages assessed for an ouster from a tenement he had nothing to do with. And the same thing would happen to Casseleggi. The agreed statement of the rents and profits relating to both lots, does not help the plaintiff out. It fails to show how much ought to be accounted for by Dolan, and how much by Casseleggi, for the two stores occupied by them separately. As for Pauline Dalton, she defends only as landlord. She ought not to be called to respond for rents and damages which the court is unable to assess against her tenants as the actual occupants of the land. The

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plaintiff must take the necessary consequences of his violation of the proper method of procedure, in the loss of his rents and profits. He will have to be satisfied with getting his title through in the face of such irregularity.

So far as the adjudication and recovery of his right of possession is concerned, we allow the judgment to stand, because the error is immaterial and works no injustice. But we could not recognize it as applying to the rents and profits without sanctioning an injustice resulting from a violation of our methods and forms of procedure. If the action was in the nature of an equitable ejectment, we might consider the propriety of giving a decree of accounting for the rents and profits.

The conclusion we have reached upon the whole case is, that according to the evidence in the record the plaintiff was entitled under the law to recover the additional nine-forty-eighths of his record title, but that he was not entitled to a judgment for rents and profits beyond a nominal sum. The misjoinder of parties defendant does not work any material injury so far as the recovery of possession is concerned, but it would result in great prejudice to the defendants to allow the damages to be assessed as prayed for by the plaintiff. The judgment as rendered in the circuit court might be corrected by substituting fifteen-forty-eighths for one-eighth, as therein recited. But we think it best to reverse the judgment of the court of appeals and the judgment of the circuit court, and order the circuit court to enter a new judgment in the place of the old one, in all respects similar to it, except as to the amount recovered, in which the new judgment will be fifteen-forty-eighths of the premises sued for.

The other commissioners concurring, the judgments of the court of appeals and the circuit court are reversed, and the circuit court of the city of St. Louis, is ordered to enter up a new judgment in conformity with the directions of this decision.

*for plain. possession
but not rents.*

NICHOLS v. MICHAEL.

23 N. Y. 264. [1861.]

Appeal from the Supreme Court. Action to recover the possession of certain goods, upon the allegation of property in the plaintiffs, and a joint detention by the defendants.

In April, 1853, the defendant Pinner purchased of the plain-

tiffs, the goods described in the complaint (the purchase amounting to \$6,500), on a credit of four and six months, for which he gave his two negotiable promissory notes. Pinner continued in business until the August following when he failed, and made an assignment to the defendant Michael, for the benefit of his creditors, giving preferences. This action was brought to recover the possession of those goods, alleging they were fraudulently obtained. The judgment from which this appeal was brought, was obtained on a second trial. * * *

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The jury found a verdict for the plaintiffs for the possession of the property, and assessed the value thereof and damages for their detention—the property having been delivered to the defendant Michael. Judgment was entered for the plaintiffs, which was affirmed on appeal at general term in the eighth district.

JAMES, J. Whenever property is obtained from another upon credit, with the preconceived design on the part of the purchaser to cheat and defraud the vendor out of the same, the vendor, upon the discovery of the fraud, may avoid the contract and retake the property, unless it has passed to the possession of a bona fide holder for value. Such, I understand, was the conclusion of the court when this case was formerly before it. (18 N. Y., 295; Hall v. Naylor, 18 N. Y., 588.) * * *

Michael having the goods in possession was not only a proper but a necessary party defendant. But it was insisted that Pinner was improperly made a party, and that under the Code the action for the recovery of the possession of personal property can only be maintained against one who had in fact or in law the possession, control or title at the time of its commencement.

Formerly, the action of detinue was the proper action where there was a wrongful detainer (2 Saund., 84). There are some dicta in the books, that this action would not lie unless the defendant was in possession (Bul. N. P., 51; 1 Selw. N. P., 546); but that was not so. The defendant was liable in the action, though he had delivered possession to another before action brought. (Comyn's Dig., A.; Jones v. Dowle, 9 M. & W., 19; Garth v. Howard, 5 C. & P., 346.) In Jones v. Dowle, Parke, B., stated the rule to be "that detinue does not lie against one who never had possession of the chattel, but does against him who once had, but has improperly parted with it." And Chitty says, "if he wrongfully delivered the goods to another he is liable; and I think the true rule was, that detinue would lie

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wherever the defendant had been in possession, whether he retained it or had wrongfully parted with it." In this State the action of detinue was abolished by the Revised Statutes, and that of replevin extended so as to serve all the purposes of both actions, and under that statute the action of replevin would lie, although the defendant had parted with the property. (2 R. S., 522, secs. 11, 19; 22 Wend., 602.) * * *

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In this view of the case, an action properly laid against Pinner, notwithstanding he had assigned and delivered the property to Michael. He had fraudulently obtained the property and had it in his possession, and wrongfully parted with it. Michael was not a bona fide purchaser; the property was in his custody as trustee, for the benefit of Pinner's creditors, Pinner having an interest in the residuum after paying his debts. Here was such a connection as would sustain a joint action against the defendants. Pinner had fraudulently obtained the goods and wrongfully transferred them to Michael to dispose of them as his trustee; Michael had the possession and refused to surrender it on demand. The Code provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. (Sec. 118.) Both these defendants claim an interest in the goods adverse to the plaintiffs; Pinner claiming that the purchase of the goods was free from fraud, and that they should be retained by his assignee, and disposed of for the benefit of creditors—Michael claiming the possession for the same purpose, and refusing to surrender on demand. They were properly joined as defendants.

I have been unable to discover any error which calls for a reversal of this case, and the judgment should therefore be affirmed, with costs.

SELDEN, J. There was no doubt sufficient evidence to justify the submission of this cause to the jury, upon the question of fraudulent misrepresentation and concealment on the part of Pinner, when he purchased the goods; and as the defendant Michael advanced nothing upon the faith of Pinner's title, he is in no better situation than Pinner himself. If the case was made out as to Pinner, the title of Michael under the assignment must of course fail, and he had no right to refuse to deliver the goods upon demand.

It is insisted that an action to recover possession will not lie

against Pinner, because he was not in possession at the time of the commencement of the suit; and because his previous possession was rightful, no attempt having been made by the plaintiffs to rescind until after the assignment and delivery to Michael; and that at all events there can be no recovery against Pinner and Michael, jointly. These objections are, I think, sufficiently answered by the cases of *Garth v. Howard et al* (5 Car. & Pa., 346), and *Jones v. Dowle* (9 Mees. & Wels., 19). In the first of these cases, the defendant Howard, being lawfully in possession of certain plate belonging to the plaintiff, had, without authority from the plaintiff, pledged it, with the other defendant Fletcher for 200 pounds. The plaintiff demanded the plate of the latter, and then brought detinue against both. It was objected there, as it is here, that Howard had no possession at the time of the commencement of the suit, and hence the action would not lie against him. The court held, that the action would lie against both. TINDAL, C. J., said: "The verdict must pass against both defendants, as one could not stand in a better situation than the other." The decision in this case was put partly upon the ground that the defendant Howard had not assumed to part with the whole interest in the property, but retained some control over it by virtue of the right of redemption. But the Chief Justice also says: "The question is, whether Howard has wrongfully pledged. If he has done so, he is answerable." The other case, viz.: *Jones v. Dowle*, fully sustains the latter ground. There the plaintiff had bought a picture at an auction, at which the defendant acted as auctioneer. The latter, by mistake, entered the name of one Clift as the purchaser, and delivered the picture to him. The plaintiff demanded the picture of Clift, who refused to deliver it, and then brought detinue against the auctioneer. The counsel for the defendant insisted that the plaintiff was bound to show that the picture was in the possession or custody of the defendant, or of an agent over whom he could exercise control, at the time of bringing the action. But the court overruled the objection. Parke, B., said: "Detinue does not lie against him who never had possession of the chattel; but it does against him who once had, but has improperly parted with the possession of it."

The theory upon which these cases proceed is perfectly sound, and applies directly to the present case. It is, that where a person is in possession of goods belonging to another, which he is bound to deliver upon demand, if he, without authority from the

owner, parts with that possession to one who refuses to deliver them, he is responsible in detinue equally with the party refusing. He contributes to the detention. It is the consequence of his own wrongful delivery. The action in such cases may properly be brought against both; because the acts of both unite in producing the detention.

It does not affect the principle, that Pinner in this case came to the possession of the goods by delivery, and under the former purchase, and not as a trespasser. If they were fraudulently obtained, he had no right to retain possession for one moment as against the plaintiffs, and could transfer no such right to his assignee. The action proceeds, not upon the ground of a tortious taking, but of a wrongful detention; and to this, Pinner has contributed by placing the goods in the possession of the defendant Michael, who refused to deliver them. The case cannot be distinguished in principle from the two English cases, to which I have referred.* * * *

Judgment affirmed.

for plain.

SIMMONS v. SPENCER.

9 Fed. (C. C. Dist. Cal.) 581. [1881.]

HALLETT, D. J. The first and second counts of the complaint set forth, in substance, a sale of certain property, which the plaintiff alleges belonged to him, and conveyances from the plaintiff to McCartney, and from McCartney to the defendant Spencer, which conveyances were deposited with the Merchants' & Mechanics' Bank of Leadville, to be delivered upon payment of a sum of money, amounting to \$20,000, for the use of the plaintiff. By instructions given upon the leaving of the deeds with the bank, the money was to be deposited to the credit of the plaintiff in this suit. Plaintiff received \$7,000 of this sum, and \$13,000, which was afterwards paid by the purchaser, whoever he may be, was not by the bank placed to the credit of the plaintiff, but was, in fact, turned over to the defendant Spencer. And upon this state of facts it is claimed that a liability has arisen upon the part of all the defendants to pay the plaintiff

*The modern actions of replevin and ejectment are generally regulated by local statutes, specifically designating the proper and necessary parties.

this sum of \$13,000. The structure of these two counts is ⁽¹⁾ for money due upon a contract; ⁽²⁾ for money had and received by the defendants to the plaintiff's use. Nothing is said about any conversion of the money by the defendants to their own use, and there is nothing in the counts to indicate that they are based upon the theory that a tort was committed by the defendants in receiving this money and appropriating it in the way in which it is alleged they disposed of it.

In order to maintain an action as for money had and received it must appear that the money was jointly received by all the defendants, and upon that the law may imply a promise on the part of all to pay it to the rightful owner; and although, upon the facts stated here, there may be a liability in that form of action against Spenceer alone, or against the parties constituting the Merchants' & Mechanics' Bank of Leadville alone, there cannot be a joint liability on the part of all these persons in that form of action, because they did not jointly receive this sum of money. The allegation is, in these counts, that the money was received by the Merchants' & Mechanics' Bank of Leadville, and by it wrongfully and fraudulently turned over to the defendant Spencer. That may make a liability as for money had and received on the part of these parties, severally,—that is, upon the part of the persons constituting the bank and upon the part of Spencer, severally; but it cannot be a liability arising by contract on the part of all of them, because they did not jointly and collectively receive this money.

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As to whether the action may be maintained against them jointly as for a tort,—in substance, as an action of trover,—there is some doubt. It is laid down in the case of *Orton v. Butler*, 5 B. & A. 652, that on a money demand merely to allege that the defendant received money and afterwards converted it to his own use, which is the form of declaration in an action of trover, the action cannot be maintained, because, they say, to allow that would be to defeat the defendant's right to set-off; and that the action of trover can only be maintained where the specific thing for which suit is brought can be identified, and that it must be possible in such case, where an action of trover is brought, for the defendant to relieve himself from all liability by tendering the property, for which the action is brought, to the plaintiff; as, for instance, when it is brought for a horse, he may surrender the horse and relieve himself from liability.

The same view is taken in several cases in *Croke's Elizabeth*;

and there are cases—one in 4 E. D. Smith, N. Y. (Donohue v. Henry, 162)—which declare that when a sum of money has been received which belongs to the plaintiff in the suit, and concerning which it is the duty of the defendant to turn over the very sum which he received to the plaintiff, *the very money*, the same dollars and the same bills, if he received it in that form, that then, if he makes any other disposition of it, the action of trover may be maintained. *Petit v. Bonju*, 1 Mo. 64, is a case in which the plaintiff brought an action in that form against parties who were conducting a lottery, claiming that he had become entitled to a sum of money as the holder of a ticket in the lottery, and that they had wrongfully refused to pay it over to him, and seeking in trover to recover the amount. The court say, in that instance, that if, in fact, any sum of money had been set apart to the plaintiff,—\$100, I think, was the amount,—if it had been parcelled off by itself, by the defendants, as his money, and afterwards they had taken those dollars and converted them to their own use, he might bring an action of trover for the dollars so parcelled off; but that he could not, upon the general charge that so much money was due to him, and wrongfully detained by the defendants, maintain that action. His action must, in that case, be in the form of an action on contract, if he would recover at all.

That is the distinction that, I think, is recognized in all of the cases, and, applying it to the present case, it may be true that the defendants, the Bank of Leadville, as to the very bills, notes, or coin, if it was such, which they received for this property, may be liable in an action of trover, or an action founded in tort for the conversion of that money, if it be so alleged in the complaint. And if that money—the very same money—was paid over to Spence, he also would be liable, and then and in that case they both might be joined in one action as tortfeasors. To illustrate, I will read a paragraph from Bliss on Code Pleadings:

“Under the Code, an action for the recovery of personal property will lie against one who has wrongfully parted with the possession of property, jointly with one in actual possession.” Section 83.

And the same principle applies to trover:

“Thus, one who has wrongfully pledged plate belonging to the plaintiff is liable to an action of detinue, jointly with the person to whom it had been pledged. So, where one has fraud-

ulently obtained a credit upon a bill of goods, and assigned them over for the benefit of his creditors, the vendor, having the right to repudiate the sale and pursue the goods, may make both the purchaser and his assignee parties to an action for their possession." Id.

For this the case of *Nichols v. Michael*, 23 N. Y. 264, is cited. The principle declared is that where a party has the right to a specific thing, and he can pursue that particular thing through several hands, he may charge all of these parties consecutively or all who held the property consecutively, in one action, for its value. So that here, if it be true that the Smiths, or the persons who constitute the Merchants' & Mechanics' Bank, received this money, and turned over the same money to Spencer, they may be jointly charged, in proper phraseology, as for converting that money, but not otherwise. And it must be the identical money.

These cases, and all the authorities that I have been able to find, go to the point that where an action is founded in tort, and maintained upon that principle, it must be for the conversion of the specific thing, and it can only be maintained where the property itself can be traced to the hands of the party to be charged. In that aspect, if the facts are truly stated in the first and second of these counts, no joint action can be maintained against these parties, unless the pleader may be able to allege that the same money came to the defendants the Merchants' & Mechanics' Bank of Leadville, and the defendant Spencer, successively. The plaintiff must allege that it was the same money, and that the defendants converted it to their own use, in order to make it an action for tort.

Upon the other theory, there is no difficulty in maintaining an action against either of the defendants separately as for money had and received, and, upon that principle, the third count, which states nothing as to the way in which the money came to the hands of the parties, but merely charges that the defendants are liable to the plaintiff for \$13,000, received by them for the use of the plaintiff, is not open to any objection.

The ruling upon the demurrer, therefore, must be, that it is sustained as to the first and second counts, because there the facts are stated which show that the defendants cannot be jointly liable, and overruled as to the third count, because nothing appears in that count to indicate that they may not be jointly liable.

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If I have made myself understood, it will be apparent that the plaintiff must amend so as to make this substantially an action of trover for this sum of money against all these parties, or by dismissing his action against one or the other of the defendants. If the action were dismissed as to Spencer, or as to the defendants who constitute the Merchants' & Mechanics' Bank of Leadville, I would see no difficulty in maintaining it against the other.

for plain on 3rd count

CARMAN v. PLASS.

23 N. Y., 286. [1861.]

Appeal from the Supreme Court. The action was commenced in the City Court of Brooklyn, where the plaintiff complained against the defendant, Plass, as the lessee for years of certain premises, claiming to recover \$116.66, being arrears of rent due and payable March 1, 1859. The lease was averred to be by indenture between the plaintiff, of the first part, the defendant Plass, of the second part, and the defendant Mix, of the third part, executed under the respective hands and seals of the parties, whereby Plass covenanted to pay the rent required; and it was alleged that the defendant Mix, by the same indenture, did, "in consideration of the premises, and of the sum of one dollar, guarantee unto the plaintiff the payment of the afore-said rent and the faithful performance of the covenants in the said lease contained." The complaint further set forth that Plass had made default in the payment of rent, and that the plaintiff had notified Mix, thereof, and that both defendants had failed to comply, etc. There was a general demand of judgment against both defendants.

The defendants demurred, on the ground that no cause of action against the defendants jointly was set forth in the complaint.

The city court gave judgment in favor of the defendants; but it was reversed on appeal at the general term of the supreme court, and judgment was rendered in favor of the plaintiff. The defendants appealed to this court.

DENIO, J. This case comes precisely within the language of section 120 of the Code of Procedure, which provides that, "persons severally liable upon the same obligation or instrument,

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including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action, at the option of the plaintiff." I see no reason to doubt that it is likewise within the meaning and intention of the enactment. It relates expressly to several and not to joint liabilities. The latter did not require the aid of a special provision; for a plurality of joint contractors always could be and generally were required to be, sued together; and provision was made in the act concerning joint debtors, for omitting to serve process on all, if the creditor should so elect. But, though this were otherwise, the provision in question, relates, in terms, to cases where a plurality of persons contract several obligations in the same instrument. That was the case here. It may be said that the cause of action is not, in this case, precisely the same against both the defendants. The lessee engaged to pay the rent unconditionally, and the surety was under no obligation until the principal had made default. But, after such default, each of them was liable for the same precise amount absolutely. They were, therefore, within the language which speaks of persons severally liable upon the same instrument. If this were otherwise doubtful, the reference to suits upon bills of exchange and promissory notes makes it entirely certain that the present case was one of those in the contemplation of the authors of the section. The parties to such paper are included in the provision. The indorsee of a bill or note, and the drawer of an accepted bill, are only liable contingently, and after being charged upon a default of the maker or acceptor. They were included in the scope of the enactment, because, though, in a general sense, parties to the paper on which their names are placed, they are not parties to the obligation, or instrument, in the same strict sense as the surety in the case under consideration. No doubt, a pretty radical innovation upon the common law system of pleading was made when, by the act of 1832 (p. 489, § 1), the several obligations of parties to a bill or a note were allowed to be enforced in a single action. But this had become familiar law when the code was written, and it seems then to have been considered that the principle might be usefully extended to cases like the present; and the section referred to appears to me to have been framed for that purpose. I am not able to entertain any doubt respecting the correctness of the judgment of the supreme court. In the cases from 11 Howard's Practice Reports, 218, and from 10 Barb. 638, to which we have been referred, the separate undertaking of the

In this case the lessee & another were liable to the property joined; this is a new; they became their obligations on the basis of per se made the same instrument they were liable to different instruments count for to action

between a guarantor & a surety;

surety was contained in a different instrument, and it was held that he could not be joined as a defendant in an action against the principal. It was assumed by the court that, in a case like the present, where both parties were bound by the same instrument, the statute would apply.

I am in favor of affirming the judgment of the supreme court.

Comstock, Ch. J., and Mason J., dissented; all the other judges concurring.

Judgment affirmed.

for plain.

MOWERY v. MAST.

9 Ncb., 447. [1880.]

MAXWELL, C. J. On the fifteenth day of April, 1876, Alfred Calvert executed a note for the sum of \$35 and interest to P. P. Mast & Co., due and payable at the Adams County Bank on the first day of November, 1877. Before the delivery of the note to P. P. Mast & Co., the following guaranty was written on the back of the note by Mowery, their agent: "For value received we hereby guaranty the payment of the within note, and waive protest, demand and notice of non-payment thereof. G. W. Mowery."

On the seventh day of January, 1879, an action was commenced against Calvert and Mowery before a justice of the peace, upon the note in question, and judgment rendered against them jointly for the sum of \$44.62 and costs. Mowery appealed to the district court. A petition being filed in the district court praying for a joint judgment against Calvert and Mowery a demurrer was interposed by Mowery on the ground of a misjoinder of causes of action. The demurrer was overruled, and judgment rendered against him jointly with Calvert. He brings the cause into this court by petition in error.

The only question at issue is the right of the holder of a note to bring a joint action against the maker and guarantor of a note. Section 44 of the Code of Civil Procedure provides that "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff." This is a literal copy of section 120 of the Code of New York, as it existed prior to 1876, and has been

copied in Ohio, Florida, Minnesota, Oregon, Colorado, North Carolina, South Carolina and Wisconsin. Bliss on Code Pleadings, section 94. In Kansas the words "and indorsers and guarantors" follow the words "promissory notes." Section 2550 of the Code of Iowa of 1873 provides that "when two or more persons are bound by contract or by judgment, decree or statute, whether jointly only, or jointly and severally, or severally only, and including the parties to negotiable paper, common orders and checks and sureties on the same, and separate instruments, or by any liability growing out of the same, the action thereon may be brought at the plaintiff's option against any or all of them." Under these provisions it is held that the guarantor, when the guaranty is on the same paper with the original instrument, may be joined as defendant with maker. *Peddleord v. Whitman*, 9 Iowa, 471; *Marvin v. Adamson*, 11 Iowa, 371; *Tucker v. Shiner*, 24 Iowa, 33; *Stout v. Noteman*, 30 Iowa, 414; *Mix v. Fairchild*, 12 Iowa, 351.

In *Gale v. Van Arman*, 18 Ohio, 36, before the adoption of the Code, the supreme court held that "where a stranger to a note payable in checks, at the time of the execution, wrote on the back and signed these words, 'I guarantee the fulfillment of the within contract,' it was a joint contract, and that the parties might be sued jointly upon it," citing *Leonard v. Sweetzer*, 16 Ohio, 1; *Stage v. Olds*, 12 Ohio, 158; *Bright v. Carpenter & Schuer*, 9 Ohio, 139. The decision is placed upon the ground that the instruments were executed by principal and surety at the same time, upon the same consideration, for the same purpose, and took effect from the same delivery. The dissenting opinion of Hitchcock, C. J., seems to draw the proper distinction between a guarantor and surety, which seems to have been overlooked by a majority of the court. Where the guaranty is made at the same time with the principal contract, and becomes an essential ground of credit, there is no doubt the consideration extends to the contract of guaranty. But a contract of guaranty is not a primary obligation to pay, but is an undertaking that the debtor will pay. The contract of the maker and sureties upon a promissory note is to pay the same. The guarantor is not a promisor with the maker. How, then, can he be sued with the maker of a promissory note upon an obligation to which he is not a party? The contract of guaranty is a separate and independent contract, and the liability of the guarantor is governed by the express terms of the contract. He cannot be joined in

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an action against the maker of a note, he not being liable as maker. Phalen v. Dinger, 4 E. D. Smith, 379; Ridded v. Schuman, 10 Barb. 633; Tibbets v. Percy, 24 Barb. 39; Allen v. Fosgate, 11 How. Pr. 218; Borden v. Gilbert, 13 Wis. 670; Virden v. Ellsworth, 15 Ind. 144; Bondwart v. Bladden, 19 Ind. 160. It follows that the judgment of the district court must be reversed and the cause remanded for further proceedings.

*Reversed and remanded.**

for def

X VOORHIS v. CHILDS.

17 N. Y., 354. [1858.]

Appeal from the Supreme Court. The plaintiffs brought their action against the surviving members of the firm of Baxter, Brady, Lent & Co., and against the respondent as surviving executor of Heman W. Childs, a deceased member of said firm. The complaint alleged the making of a promissory note by the partnership in the lifetime of Heman W. Childs; its maturing and non-payment; the subsequent death of Childs; the granting of letters testamentary to the respondent as his executor, etc. It did not aver any previous suit against the surviving partners, or their insolvency. The respondent, Child's executor, demurred on the ground that the complaint did not state a cause of action against him. He had judgment for the dismissal of the complaint as against him, which having on appeal been affirmed, by the supreme court at general term in the seventh district, the plaintiffs appealed to this court.

SELDEN, J. Prior to the enactment of the code of procedure there was a conflict of opinion between the courts of this state and those of England, as to the remedy allowed to the creditors of a partnership against the representatives of a deceased partner. It was conceded by both that only the surviving partners could be sued at law, but ^{it} was held by the English courts that the representatives of the deceased partner might be immediately proceeded against in equity and compelled to pay the entire debts of the firm, without any previous resort to the surviving members or any evidence that such debts could not be collected from them; while on the other hand ^{our} courts held either that

*Accord: Graham v. Ringo, 67 Mo. 324.

*Cases which fall within 2nd section
about those severally liable on same note:
1. Cases of real suretyship*

the remedy against the survivors must first be exhausted or it must appear that they were insolvent and unable to pay.

Prior to the case of *Devaynes v. Noble*, Mer. 397, the decisions of the court of chancery of England appear to have been, for a considerable time at least, in accordance with those in this state. The precise ground of the change seems to have been this: In the earlier cases it had been assumed that the liability in equity of the estate of the deceased partner was produced by a sort of equitable transfer to the creditor of the right of the surviving partners to insist that the estate of their deceased associate should contribute to the payment of the debts of the firm; but upon its being afterwards held that the obligations of partners were to be regarded as joint and several, the English courts said that in all cases of that kind creditors had a right to pursue their remedies against all or either of their debtors. They therefore held that they might proceed immediately in equity against the representatives of a deceased partner, without resorting to their legal remedies against the survivors. The courts in this state, however, refused, for what appear to be substantial reasons, to adopt the change. Its effect was, to apply to a proceeding in equity, the strict legal rules applicable to suits at law. It obviously overlooked many equitable considerations of great force.

① The surviving partners succeed primarily to all the rights and interests of the partnership. They have the entire control of the partnership property, and the sole right to collect the partnership dues. The assets of the firm are of course to be regarded as the primary fund for the payment of the partnership debts, and it would seem equitable at least, that the parties having the exclusive possession of this fund should be first called upon. The answer given to this by the English courts, that the representatives of the deceased partner have their remedy over, seems hardly satisfactory. The presumption is, that the primary fund is sufficient to meet the demands upon it. Why then, permit in equity a resort to another fund, and thus give rise to a second action for its reimbursement. Besides, ^② these English decisions permitting the creditor to proceed in the first instance in equity against the estate of the deceased partner, are in conflict with the established doctrine that parties must first exhaust their legal remedies before resorting to courts of equity.

Two arguments against English doctrine

But whether these considerations are sufficient to justify the positions assumed by our courts or not, it may be regarded as having been settled in this state, prior to the code, that the

creditors in such a case, could not come into a court of equity without showing, either that the surviving partners had been proceeded against to execution at law, or that they were insolvent. (Grant v. Shurter, 1 Wend. 148; Hamersley v. Lambert, 2 John. Ch. 608; Leake & Watts Orphan House v. Lawrence, 11 Paige 80; 2 Denio 577; S. C.) In the last of these cases, the English cases referred to were cited and distinctly overruled. There are many American cases, both in the State and the United States' courts supporting and confirming the doctrine of the courts of this state upon the subject. (Pendleton v. Phelps, 4 Day, 481; Remsdy v. Kane, 1 Gallis., 385; Sturges v. Beach, 1 Conn., 509; Alsop v. Mather, 8 Conn., 584; Caldwell v. Stileman, 1 Rawle, 212; Rubbell v. Perrin, 3 Ham. Ohio, 287.)

The complaint in this case is in the form of an ordinary action at law upon a promissory note against all of the surviving partners, together with the executors of the deceased partner; and contains no averment that any proceedings have ever been had against any or either of the surviving partners, or that they are without the means of payment. From what has been already said, it is plain that formerly no such action could have been maintained. The question presented is, how far the code has changed the law in this respect. It cannot be claimed that it has altered the principles which govern the responsibilities of the representatives of a deceased partner for the partnership debts, or the order of liability as between them and the surviving partners. It contains not a word indicative of such intent. The ~~later~~ partners, therefore, are still primarily liable for the debts; and the estate of the deceased partner can only be resorted to in case of the inability of the survivors to meet them. Hence it is plain that this action cannot be sustained as a suit in equity, founded upon the ultimate liability of the representatives of Childs; because it has been shown, that in such an action it is indispensable to aver, either that the survivors have been prosecuted to execution at law, or that they are without the means of payment.

What I understand the plaintiff's counsel to claim is, that considering the suit as founded upon the legal liability of the surviving partners, the plaintiffs were warranted in making the executors parties, by section 118 of the code, which provides that, "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff; or who is a necessary party to a complete determination or settlement of the questions involved therein." This section is in terms, a

mere statutory enactment of the rule as to parties which has always prevailed in courts of equity; but as it is not expressly limited to cases of that character, it has been contended, not only in this case but in others, that it is applicable to all legal as well as equitable actions.

The difference in the rule as to parties between courts of law and of equity was not accidental, but had an obvious foundation in reason. Where all persons having an interest in the controversy are made parties, cases are frequently rendered exceedingly complex. Judges can command the time and patience, and may be safely endowed with the discretion required to disentangle their intricacies and dispose of their varied equities. But it is extremely inconvenient, if not impossible, to try such cases by a jury. They are qualified to deal with simple issues only; and the rules of the common law as to parties, as well as those which prevailed in the formation of issues, were adapted to the nature of the tribunal before which the cases were to be tried. The attempt to apply the equitable rule as to parties, to all legal actions, would lead to infinite embarrassment in the trial of jury cases. If, however, the legislature had power to prescribe such a change, and has done so, the courts have no discretion in the matter, but are bound to execute the legislative will.

It is supposed by some that it was intended to abolish by the code all distinction, not only in forms but substance, between legal and equitable actions; and it must be conceded that many of its provisions taken by themselves might seem to indicate such an intent; and yet nothing can be clearer than that the legislature has wholly failed to carry into effect such an intention if it existed. On the contrary, the code expressly retains the principal differences which distinguished the two classes of actions.

- ① Actions at law were to be tried by a jury; suits in equity by the court. This distinction remains undisturbed.
- ② In legal actions, with few exceptions, compensation in damages was the only mode of redress; while in such as were equitable the relief was such as was adapted to the exigencies of the case. The code makes no change in this respect.
- ③ In one of these classes of action costs were recoverable by the successful party as a matter of course; in the other, they rested in the discretion of the court. This remains as before.

Now it is plain, that if we should make the code a consistent system, one that can be practically administered, we must construe it, not in view of the general proposition, obviously untrue,

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that the distinctions between actions at law and suits in equity are abolished, but in the light afforded by a comparison of its various provisions. Take, then, the case in hand. Is it reasonable, in view of the important distinctions thus made, by the code itself between legal and equitable actions, to hold that it was intended that section 118 should apply to both these classes? Let us look at some of the difficulties to which this would lead. The mode of trial depends upon the nature of the action. Those which merely seek to recover a sum of money are to be tried by a jury. The legislature was forced to adopt this provision by the constitution, which preserves trial by jury in all cases where it had theretofore existed.

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If, however, the action involves anything whatever besides the recovery of money, unless it be for the recovery of specific, real or personal property, or to obtain a divorce, if it seeks the least modification of the judgment in respect to any of the parties, it then becomes triable by the court. The language of the code is, that "an issue of fact in an action for the recovery of money only * * * must be tried by a jury." It is easy to see, therefore, that if section 118 is to receive the construction contended for, most actions for the recovery of money, as well as actions for the recovery of specific real or personal property by bringing in parties having some equitable interest, real or supposed, in the controversy, may be readily converted into actions to be tried by the court instead of a jury. Has the legislature power thus to subvert, or enable parties to evade, an important constitutional provision? If there is any one clause of the constitution which the courts are under greater obligation to protect from all encroachment than others, it is that which preserves trial by jury; and it is clearly impossible for them, in view of their duty in this respect, so to construe the provisions of the code as to render all actions, legal as well as equitable, triable by the courts at the option of the plaintiff.

But there are other embarrassments in the way of the construction of section 118, for which the plaintiff contends, growing out of the provisions of the code in respect to costs. It will be found difficult if not impossible to reconcile that construction with those sections which give costs *of course* to the successful party in all actions for the recovery of money or of specific real or personal property. In actions of ejectment especially, where so many collateral and subordinate equities frequently exist, the task of harmonizing the equity rule as to parties with the com-

mon law rules as to costs and as to the mode of trial, would be attended with serious embarrassment.

Taking the code then, as a whole, and comparing its various provisions with each other, it seems evident that the legislature never intended section 118, to receive a construction which would authorize a suit like the present. Although all the difficulties which have been suggested, might not arise in this case, yet the section in question can only receive one of two interpretations. It must either be confined strictly to actions of an equitable nature, to which alone it seems appropriate, or it must extend to actions of every kind, whether legal or equitable; and I have no hesitation in holding, for the reasons suggested, that it should be regarded as a mere statutory adoption of the equitable rule on the subject of parties, and was intended to have substantially the same application. The language of the section itself points to this interpretation. It authorizes the bringing of all those who are *necessary* parties "to a complete determination or settlement of the questions involved." This language is inappropriate to actions for the recovery of money only, or of specific real or personal property; but embraces the very gist of the rule which has always prevailed in equitable actions.

It is worthy of remark that the construction here contended for, is that which has been of necessity to a very great extent practically put upon the various provisions of the code. Cases are found so naturally to arrange themselves according to the classification which existed prior to the code, that the distinction between legal and equitable actions, is nearly as marked upon all the papers presented to the courts as formerly. The same names are not used, but the nature of the cases has not changed, nor have the distinctions been abrogated. Very few attempts have been made to carry into practical effect the idea of blending legal and equitable causes of action in one common proceeding. Were it necessary to the decision of this case, I should be prepared to hold, that that clause of the constitution which provides, that "there shall be a supreme court having general jurisdiction in *law and equity*," presents an insuperable barrier to any legislative merger of the two jurisdictions. While the legislature may, as it has done, abolish the distinctions which existed in mere matters of form, yet it is easy to show that to blend the two in respect to matters of substance and principle, would be virtually to subvert the jurisdiction of the court in regard to the one or the other; which the legislature clearly has

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As therefore the present action must be regarded as one of a purely legal nature, brought against the surviving partners, upon their legal liability, it follows, that the executors of the deceased partner, who is liable only in equity, were improperly made parties. Had the defendants united in a demurrer upon the ground that several causes of action were improperly joined, they might all perhaps have been entitled to judgment. But the demurrer is actually put in by the executors alone, and rests upon the narrower ground that the complaint does not state facts enough to constitute a cause of action against *them*.

If we are right in our reasoning, the complaint is clearly defective in this respect, and the judgment of the supreme court should therefore be affirmed.

PRATT and STRONG, Js., concurred in this opinion, and Denio J., in the construction therein put on No. 118 of the code. All the other judges concurred in the result, upon the ground that the complaint made no cause of action against the respondent, reserving the question whether the insolvency of the surviving partners, or of the partnership estate, would justify a joint action against the survivors and representatives of the deceased partner.

*Judgment affirmed.**

for def. - exec.

FISHER v. CHADWICK.

4 Wyo., 379. [1893.]

CONAWAY, J. These two cases in error in this court arise from a single action in the district court. Edwin W. Hopkins brought this action in that court against Charles F. Fisher, and John M. Chadwick and Charles F. Fisher, administrators of the estate of Jehu J. Chadwick, deceased. He obtained judgment against

*In Missouri the substantive law has been changed by the following statute:

Revised Statute Missouri (1899). Section 890. *Joint debt shall survive, against whom.* In case of the death of one or more of the joint obligors or promissors, the joint debt or contract shall and may survive against the heirs, executors and administrators of the deceased obligor or promisor, as well as against the survivors.

them. Charles F. Fisher brings the cause to this court for review by his individual petition in error. John M. Chadwick and Charles F. Fisher, administrators of the estate of Jehu J. Chadwick, deceased, also bring the cause to this court for review by their separate petition in error.

The petition of plaintiff, Hopkins, filed in the trial court, alleges a joint and several contract of Charles F. Fisher and Jehu J. Chadwick with himself. Before the commencement of this action, Jehu J. Chadwick died, and the action is against his administrators and Charles F. Fisher as joint defendants. The administrators of the estate of Jehu J. Chadwick, deceased, demurred to this petition on the ground that it does not state facts sufficient to constitute a cause of action against them, in not alleging the insolvency of Charles F. Fisher, the surviving joint contractor, and that there is an improper joinder of causes of action against Charles F. Fisher, individually, and against these administrators.

At common law, the rule was absolute that the estate of the deceased joint contractor was not liable to the obligee in the joint contract except in the case of the insolvency of the surviving joint obligor. If the survivor was solvent there was a plain and adequate remedy by action at law against him. In such case the liability of the estate of the deceased joint obligor was to contribute to him after the debt was collected from or paid by him. In case of his insolvency the obligee in the joint contract could bring his action in equity against the administrators of the deceased joint obligor. But the petition alleges a joint and several contract. It is not claimed that these rules apply, or ever applied, to such a contract. But the same point is raised by an instruction to the jury requested by the defendant administrators, and refused by the trial court. This instruction is as follows: "The plaintiff cannot recover against the administrators of Jehu J. Chadwick, deceased, in this action, upon a joint agreement or contract jointly made by Charles F. Fisher and Jehu J. Chadwick." There is evidence in the record from which the jury might have found that the contract in question was joint, and not joint and several, as alleged, and there is no allegation in the petition of the insolvency of the survivor. Therefore, if the common law rule prevails, the instruction should have been given, and the refusal to give it was error, which might have been very prejudicial. The question is thus fairly presented whether, under our code, the common law rule prevails,—that

This instruction should have been given, as above

the administrators or executors of a deceased co-obligor in a joint contract are liable to the obligee in an action on the contract only in case of the insolvency of the survivor. This is a question upon which our American courts are in direct and hopeless conflict. It is a question of first impression in this state, and it is our duty to endeavor to ascertain and adopt the view which is most in harmony with the provisions of our Code of Civil Procedure, and best adapted to carry out these provisions in their true meaning and intent.

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The one sufficient reason for the rule of the common law that the surviving joint obligor and the representatives of the estate of the deceased could not be joined as defendants in an action at law was the inability of a court of law to render separate and different judgments in a single action,—against the survivor, to be satisfied de bonis propriis, and against the administrator of the estate of the deceased, to be satisfied from such estate in due course of administration. From the same reason it followed that the survivor alone was liable in an action at law, and that if he were solvent, and the action thus available for the collection of the debt, the plaintiff need go no further, and he was not permitted to do so. In the code states, this, the only reason for the rules of the common law upon this subject, has entirely disappeared. There is no longer any objection to joining causes of action which were formerly distinguished as legal and equitable. Our courts are no longer hampered as to the form of the judgments they may render in one single form of action, called a "civil action." But sometimes a rule of law survives after the reason for it is gone. This may be the case where the reason for the rule has been abolished by legislation, unless concurrent legislation also furnish a new rule. With all due respect for the opinions of some eminent courts which seem to hold differently, we are of the opinion that codes such as ours, doing away with the reason of the common law rule under consideration, as to joinder of parties defendant, also furnish, in terms sufficiently clear, a new rule to be followed in its stead. As to parties defendant, we have the following broad proposition: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." Rev. Sts. § 2395.

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The defendants in the case at bar all deny any liability on their part to the plaintiff in the action. The primary question

to be determined is whether they are so liable. If it be determined that they are liable, the next question is the amount of such liability. In both these questions, the defendant administrators are interested in their representative capacity precisely to the same extent as their decedent would be interested, were he alive. It is just as necessary for them to defend for the estate as it would be for him to defend for himself. If the action were against the survivor alone, they would still be interested. It does not change the extent of their liability, whether they are held to pay the obligee in the joint contract, or to the surviving obligor, by way of contribution. To a complete determination or settlement of the questions involved, they are necessary parties. Their interest in the amount of the judgment, whether the action be against the survivor alone or not, is direct. It is also adverse to the plaintiff. If the action were against the survivor alone, their liability to contribute could be no more than their proportion of the judgment collected from him. If he succeeded in defeating the action, there would be no contribution. It seems evident that it is the true and intent meaning of this provision of the code, and, indeed, authorized by its express language, that all these parties should be joined as defendants, and that their rights and liabilities should be determined in a single action. The evident policy of legislation is to avoid a multiplicity of suits, and to reach an end to litigation. The English courts no longer follow the old common law rule, making the solvent surviving joint obligor alone liable to the obligee in the joint contract. They permit the action to be brought against the administrators in the first instance, whether the survivor be solvent or not. Several of the American states hold with the English courts. See Pom. Rem. & Rem. Rights, §§ 302-304; Bliss, Code Pleading, §§ 105, 106; Braxton v. State, 25 Ind. 82; Burgoyne v. Insurance Co., 5 Ohio St. 586; Trimmier v. Thomson, 10 S. C. 164. A number of code states hold differently, but we think not with the better reason. See Voorhis v. Child, 17 N. Y. 354; Sherman v. Kreul, 42 Wis. 33. We are of the opinion that the trial court did not err in overruling the demurrer, nor in refusing the instruction quoted. * * *

*Judgment affirmed.**

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*See also Lawrence v. Doolan, 68 Cal. 309.

The Wyoming court in this case changed the substantive law of joint obligations, just as the Missouri statute, Boston

Administrators are just as much interested as would decedent have been.

UNION BANK v. MOTT.

27 N. Y., 633. [1863.]

'Action against Garrett S. Mott and Jacob H. Mott to recover some ninety six thousand dollars alleged to have been fraudulently overdrawn by them by collusion with the defendant's book-keeper.

Pending the action, Jacob H. Mott died, and letters testamentary were granted to Julia M. Mott, as executrix. * * *

* * * The cause was again noticed for trial before the referee, in December last. On the 28th of that month, the plaintiff obtained an order from Mr. Justice Leonard, at special term, requiring the defendant, Garrett S. Mott, and the executrix of the will of Jacob H. Mott, deceased, to show cause at the special term, on the first Monday in January, why the cause should not be revived against said executrix, and why said executrix and Garrett S. Mott should not be required to answer the supplemental complaint, a copy of which was annexed to the plaintiff's petition, on which the order to show cause was obtained.

The supplemental complaint demanded judgment against the defendant, Julia M. Mott, as executrix, and against the said Garrett S. Mott, and each of them, for the sum of \$97,254.90, and interest from Feb. 9th, 1851, besides costs, and that the plaintiffs have execution therefor, as well against the body of the defendant, Garrett S. Mott, as against his property.

The petition and the order were served upon the attorney for Garrett S. Mott, but the executrix, being in the state of Massachusetts, no service was made upon her, and on the 7th of January, on hearing of the motion between the plaintiff and Garrett S. Mott, the motion for leave to revive the action against the executrix was denied. The plaintiff appealed from that order to the general term, where the order was affirmed, and the appeal to this court, which is now asked to be dismissed, is from the order of affirmance.

SELDEN, J. The defendants' counsel insists that the original defendants were charged upon a joint liability, which survived against Garrett S. Mott only, on the death of his co-defendant, and that the action could not, for that reason, be revived against the representative of the deceased defendants. If the action were founded upon the joint liability of the defendants arising

out of an implied contract on their part to return the money wrongfully obtained by them, which is the usual form of action in such cases, the position of the defendants' counsel would be correct. (*Voorhis v. Childs' Executor*, 17 N. Y., 354). The plaintiff's counsel, however, insists, and I think, correctly, that the basis of the action is tort, and not contract, express or implied; that its object is not to recover for money had and received by the defendants to the plaintiff's use (thus waiving the tort), but to obtain judgment for the damages which the plaintiff has sustained through the fraudulent conduct of the defendants. This being the true foundation of the action, and all torts, committed by more than one person, furnishing several as well as joint causes of action, the right of action survived, as well against the personal representative of the deceased, as against the surviving defendant. The surviving wrongdoer could not, however, in a common law action to recover damages, be joined with the representatives of his deceased associates, for the reason that there is no joint liability, and neither the same judgment could be rendered, nor the same execution issued, against both. The code, I think, has made no change in this respect. It has not authorized, in actions merely personal, for the recovery of money only, the joinder of defendants primarily and personally liable, with others liable only in a representative capacity. (*Gardner v. Walker*, 22 How. Pr., 405; *Voorhis v. Childs' Executor*, 17 N. Y., 355.) Where parties are jointly and severally liable, either for torts, or upon contracts, the personal representatives of deceased parties may be proceeded against by action at the same time with actions against the surviving parties, but it must be by separate actions, and not by joining both classes of defendants in one action; and on the decease of one of several defendants thus liable in a pending action, such action cannot be revived, as a joint action, against the surviving parties and the representatives of the deceased party. I can, however, see no objection to the revivor of the suit in such cases, as against the representatives of the deceased party as a separate action, as was suggested by Mr. Justice Welles, in Gardner v. Walker, supra. Such is undoubtedly the appropriate course on the death of a party severally liable on a bill or note, joined with other parties, as defendants under section 120 of the code of procedure; and there would seem to be great impropriety in extending that practice to all cases of joint and several liability. Section 121 of the Code may properly be held to justify that course. Thus far I

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have deemed it proper to consider the merits of the question involved in the appeal, the subject having been discussed by counsel, although the merits are not before the court on this motion.

The papers do not disclose the grounds upon which the supreme court denied the plaintiff's motion; but, assuming it to have been held by that court that there could be no revivor of the action as a joint one against Garrett S. Mott and the representatives of Jacob H. Mott, they must have regarded the motion made in the action against the surviving party, as irregular. The papers were served on the attorney of Garrett S. Mott only, no service having been made on the executrix of Jacob H. Mott. *plan, while one party, ad for a no- against him ring into bonds sent other party n. don't; but so could not showed*

The motion, therefore, was made against Garrett S. Mott, in an action in which the petitioner was the plaintiff, and he alone was defendant, for leave to revive a separate action in favor of the same plaintiff against another defendant. In that question, Garrett S. Mott had no interest. He was no proper party to the proceeding, and if the order asked for had been granted, it would have been entirely nugatory. The denial of the motion, under such circumstances, represents no question which can be reviewed in this court. It in no way affected the substantial rights of the appellant, which would have gained nothing if the motion had been granted, and has lost nothing by its denial. If the right existed, as I am inclined to think it did, to revive the action against the executrix of Jacob H. Mott, that right remains wholly unaffected by the decision which was made in the court below. The appeal should therefore, be dismissed with costs.

Ordered accordingly.

for def.

RYAN v. RIDDLE.

78 Mo., 521. [1883.]

MARTIN, C. The plaintiffs sue as joint obligees in a bond. The bond was executed by James Riddle, defendant, as sole obligor, in favor of the plaintiffs and the defendant, Smith, as joint obligees. It seems that defendant, James Riddle, sold to Josiah J. Ryan, Luther Shobe and Frank Smith, a stock of tools used by him in the tin business, and that in consideration of the sale he gave them his written obligation conditioned that he would not manufacture tinware or sell stoves in the town of

Butler for the space of one year. The plaintiffs, being two of the obligees, bring this suit, alleging a breach of the bond by Riddle, the obligor; they further allege in substance that Frank Smith, their co-obligee, at the execution of the bond and since that time, has been secretly engaged with Riddle and with others in manufacturing tinware; and that he refused to join with plaintiffs in the prosecution of their suit, for which refusal he was made a defendant under the provisions of the practice act. The defendant Riddle demurred to the petition, and judgment was rendered in favor of the defendants, from which a writ of error is prosecuted in this court.

The instrument sued on is clearly a joint obligation for the payment of money. At common law no action could be maintained on it except in the names of all the obligees or their representatives. It is argued by the plaintiffs in error that this rule of the common law has been modified by section 3466 of the Practice Act, which reads as follows: "Parties who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should be joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the petition." R. S. 1879, § 3466. This provision has remained in the same language since the adoption of our code of practice. It embodies a rule familiar to equity pleaders, but it was unknown at common law. The construction given to it in modern practice has not been uniform. In some states it has been applied to law cases. *Hill v. Marsh*, 46 Ind., 218; while in others it has been confined to equity cases. *Andrews v. Mokelumne Hill Co.*, 7 Cal., 330. If it was still open for construction in this state, we might hesitate between conflicting constructions. *Habicht v. Pemberton*, 4 Sanf., 657. But at an early day our supreme court held that this clause in our practice act did not authorize any number less than the whole of the obligees in a bond for the payment of money to maintain a suit upon it. *Clark v. Cable*, 21 Mo. 223; *Rainey v. Smizer*, 28 Mo., 310.

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In an action of ejectment brought in the name of the trustees of a corporation, one of the trustees appeared in court and as plaintiff asked leave to dismiss the case so far as it concerned him, which was refused by the court upon the other plaintiffs giving bond to indemnify him against costs. The learned judge giving the opinion in the appellate court held that there was no error in this action of the court for the reason that upon his refusal to join as plaintiff he might have been placed on the other

side as defendant. *McAllen v. Woodeock*, 60 Mo., 174. The previous cases were not overruled or alluded to in the opinion. The rights and obligations of the plaintiffs as officers and trustees of a corporation present a marked distinction between them and the obligees of a note or bond, which would naturally forbid the result of overruling the previous cases on such instruments, in the absence of any allusion to them. These early cases have been accepted and followed by the profession for nearly thirty years, and there is nothing peculiar to the case at bar, which can justify a distinction in its favor.

Certain incidents flow from the nature of a joint obligation or rather an obligation insuring to joint obligees. They are joint proprietors, and one must have as much right as the other to say and determine when suit shall be brought and when it shall be compromised or settled without suit. Neither can sue alone for his proportion. 1 *Parsons Con.*, p. 13. It has been settled in this state that one of two joint obligees of a contract has the power to discharge and release the joint obligation. This was recently held in the case of *Henry v. Mt. Pleasant Township of Bates Co.*, 70 Mo., 497, in which it was charged in the petition that the plaintiff's co-obligee had fraudulently and collusively combined with the obligor being sued to defraud the plaintiff out of his portion of the joint demand by receiving the amount of it and giving a bond to indemnify the obligor against the plaintiff. The judgment of the lower court sustaining a demurrer to the petition, was affirmed, and the case of *Clark v. Cable* was cited in support of the opinion. If one of the obligees can settle and dispose of the whole demand, it would be difficult to deny him upon principle as well as authority the lesser right of preventing suit upon it without his consent. The right of release and discharge remaining with him would render the right to sue without him an unavailing advantage, because he could release the whole demand after suit as well as before.

It seems to me the obligor of the contract is also interested in the mode of enforcing the obligation he has assumed. A suit against him by an obligee, although including the other obligee as defendant, necessarily involves an issue in which he is not interested, viz., a settlement of the interest or share belonging to each obligee respectively. This might involve the taking of a long account and the settlement even of a partnership.

For these reasons, I am persuaded that the disability of the plaintiffs to maintain their suit in this form is an infirmity which

inheres in the nature of the contract they entered into, and is not mere matter of form intended to be abolished by the Practice Act. The judgment is affirmed. PHILLIPS, C., concurs.

WINSLOW, C., dissenting: I cannot concur in the foregoing report. In my opinion Revised Statutes, section 3466, was intended to apply to all classes of actions.* The code applies to all classes of actions, and, in adopting the rules of practice under it, its framers simply adopted many of the old equity rules of practice, because of their greater liberality and for the express purpose of abating the strictness of the old common law rules. It may as well be said that the entire code only applies to equitable actions, as that the section in question is so limited. There is no exception to indicate any such intention. Every action is now an action on the facts, all the old forms and distinctions having been abolished. The last expression of this court is to the effect that the section in question applies to an action of ejectment, which is not an equitable action. *McAllen v. Woodcock*, 60 Mo. 174. *Henry v. Mt. Pleasant Tp.*, 70 Mo. 497-500, does not conflict with *McAllen v. Woodcock*. There only one of two joint obligees had sued, and it was held that he could not sue alone. The other obligee was not before the court, on either side. The question involved here was not directly considered. I think that *Clark v. Cable* and *Rainey v. Smizer*, cited in the majority report, should be overruled, and a more liberal and rational rule established. They are adverse to the true spirit of the code.

The majority report was approved, Ray, J., dissenting; Sherwood, J., absent.†

for def.

RIZER v. GILLPATRICK.

16 Kan. 561. [1876.]

The opinion of the court was delivered by

BREWER, J.: The facts of this case are briefly as follows: Gillpatrick and Rizer were the administrators of the estate of Samuel S. Caswell deceased, appointed in 1871. Rizer, into whose hands the funds of the estate seem to have passed, de-

*In 1889 the following clause was added to the section: "This section shall apply to both actions at law and suits in equity."

†Accord: *Ins. Co. v. Ry.*, 26 Pac. (Or.) 838.

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 posited them with the banking firm of James Streeter & Co., of
 which firm he was a member. When the three years for closing
 estates had passed, Gillpatrick desired to make a final settle-
 ment, draw out the funds from the bank, and pay them over to
 the heir. Rizer was unwilling. After some delay, Gillpatrick,
 as one of the administrators, brings this action against Streeter
 & Co. to recover from them the amount deposited, and makes his
 co-administrator a party defendant, alleging that he refused to
 join in any settlement of the estate, and to join in bringing this
 or any action to recover the funds. Demurrers by Streeter &
 Co., and by the co-administrator, to the petition were overruled,
 and this is the first question presented. Subsequently the sole
 heir of the deceased brought an action against the two adminis-
 trators and the surety on their official bond, alleging a final set-
 tlement had, since the commencement of the suit by Gillpatrick,
 a balance due on said settlement, and praying judgment for
 such balance. Upon this defendants herein filed a motion set-
 ting up said proceedings, and asking a dismissal of this action.
 This motion was also overruled, and this is the only other ques-
 tion presented. The case then proceeded to judgment in favor of
 Gillpatrick. The judgment however directed that the amount
 found due from Streeter & Co. be paid to the clerk of the court,
 to be applied under its order to the satisfaction of the demand
 of the heir for the balance due from the estate.

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 Was there any error in these rulings? We think not. The
 learned counsel for plaintiff in error contend, that one adminis-
 trator cannot sue his co-administrator, nor sue alone for a debt
 due the estate; that under the executors and administrators act,
 if one administrator neglects his duty, he can be removed by the
 probate court, and the remaining administrator can then pro-
 ceed to close up the estate alone, and that this remedy is to the
 exclusion of any other. It is undoubtedly true, as a general
proposition, that one administrator, there being more than one,
cannot sue alone for a debt due the estate. There is a unity of
 interest which requires that all should join as plaintiffs. The
 debt is due to the estate, and neither partially nor wholly to
 either administrator. The estate, is the party in interest, and the
 legal representatives of that party must be the nominal plain-
 tiffs. This is true in all cases where there is a unity of interest
 in several parties. The code so provides (Gen. Stat. 636, sec.
 37): "Of the parties to the action, those who are united in in-
 terest must be joined as plaintiffs, or defendants." But it also

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provides for a contingency like the present, in which one of those united in interest refuses to join as plaintiff. The latter part of the same section reads, "But if the consent of one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in the petition." Language could not be more apt for a case like the present. The time for closing an estate having arrived, one of the administrators desires to collect from the bank the money of the estate there deposited, make a final settlement, and pay over to the heir the balance found due. The bank refuses to pay, and the other administrator refuses to join in a suit to compel payment. It is exactly the condition named in the statute. This was allowable under the old practice in equitable actions. Now there is but one form of actions, and the language of the statute is general, applying to all actions. In Pomeroy on Remedies and Remedial Rights, a late work, and one which is the most philosophical treatise on the code yet published, and one of the few text-books among the many flooding the press and the profession today having permanent value, and destined to rank among the legal classics, on page 309, sec. 261, the author says: "It is not indispensable, however, that all the executors or administrators should be plaintiffs; for it is enough, in equity, if all the parties are before the court, so that one executor or administrator may sue as plaintiff, if he make his co-executor or co-administrator a defendant"—citing *Wilkins v. Fry*, 1 Meriv. 244, 262; *Blount v. Burrow*, 3 Bro. C. C. 90; *Dare v. Allen*, 1 Green Ch. 288. And again, on page 233, sec. 195, he adds, after quoting sec. 37, Code of Kansas, and the like provision from other states: "Referring to these provisions, it is plain that their language is general, inclusive, without exception, and applying alike to all kinds and classes of actions." And further, "No exception being made, nor even suggested, the courts cannot, unless by an act of positive legislation, by an act of direct usurpation, create an exception, and say that these general terms were intended to apply to equitable suits alone, while legal actions were intended to be left outside of their scope and effect." See also *Decker v. Miller*, 2 Paige, 150; *Smith v. Lawrence*, 11 Paige, 206; *McGregor v. McGregor*, 35 N. Y. 218. It is true, that Rizer had an equal right with Gillpatrick, pending the administration, to the possession and control of the funds, and under ordinary circumstances neither could maintain an action to recover these funds from the other. But here, the duty of closing the estate, and paying

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Voornis v. Childs represents weight of authority on that question; while Judge Brewer's opinion represents weight of authority on this point. If fairly construing code will with a change in

over the balance to the heir, existed. Rizer refused to discharge this duty. One step of the duty was the collection from the bank of the funds there deposited. The bank owed the estate so much. Both administrators should have united in collecting this debt. Rizer's refusal justified Gillpatrick in proceeding alone. That any remedy the one administrator might have by proceedings in the probate court does not exclude the jurisdiction of the district court in this case, seems clear. *Shoemaker v. Brown*, 10 Kan. 383. * * *

Judgment affirmed.

for plain.

LEUCKE v. TREDWAY. 2

45 Mo. App. 507. [1891.]

Equitable action by a judgment creditor of a foreign corporation against two of the stockholders domiciled in Missouri, to charge them in respect of their liability for unpaid stock. Decree for plaintiff and defendants appealed.

THOMPSON, J. (after stating the facts and holding that the suit was properly brought in equity):

This suggestion also disposes of the objection urged by the defendant as to the parties defendant. This objection is, first, that there is a misjoinder of parties; that, the liability of the stockholders being several, each stockholder should be proceeded against separately. Waiving the question whether this objection has been properly raised, we observe that the rule declared in this state in *Perry v. Turner*, 55 Mo. 418, that each stockholder must be separately sued, is only applicable to cases at law, and it proceeds upon the well known ground that each contract of subscription to the stock of the corporation is a separate contract; that each subscriber assumes a separate obligation, and may have a separate defense; and that the modes of procedure in the legal forum are not flexible enough to admit of the joining in one action of several defendants whose liability, if any exists, arises on separate and distinct undertakings. In holding that several stockholders cannot be joined in an action at law, our supreme court has declared an obvious rule, which has been declared and acted upon in many other jurisdictions. (*Crease v. Babcock*, 10 Met. (Mass.) 525; *Paine v. Stewart*, 33 Conn. 516; *Pettibone v. McGraw*, 6 Mich. 441; *Hollister v. Bank*, 27 N. Y.

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393; Shafer v. Moriarty, 46 Ind. 9; Abbey v. Dry Goods Co., 24 Pac. Rep. (Kan.) 426.)

But this rule does not apply to proceedings in equity; because the object of such proceedings is more extensive than that of the action at law; its object is not merely to satisfy the creditor or creditors who prosecute the action, but also to adjust the equities of the stockholders as among themselves, thus doing, as far as possible, complete justice to all parties. Therefore, the general rule is that an action in equity should be brought against all the shareholders within the jurisdiction. Thomp. Stockh., sec. 353, and cases there cited; Curran v. Bradner, 27 Ill. App. 582; VonGlahn v. Harris, 73 N. C. 323; Dunston v. Hop Tonic Co., 47 N. W. Rep. (Mich.) 322; Terry v. Martin, 10 S. C. 263; Wellington v. Ins. Co., 52 Hun. 408. In the equity forum the question never is whether too many, but always is whether too few, have been impleaded. Considering that this is a suit in equity, this objection is unavailing. But the error, if it were one, would be without prejudice, because the court has apportioned the liability between two defendants; and surely neither one of them ought to be heard to complain in a court of justice that he was not compelled to pay all. * * *

Judgment affirmed.

— for plain ✓

OLIPHINT v. MANSFIELD.

36 Ark. 191. [1880.]

This was a suit by the trustee under a deed of assignment, for the benefit of creditors against a number of judgment creditors and the constable, to restrain them from levying upon the assigned property under their respective judgments.

The defendants demurred to the complaint for a misjoinder of defendants, and because it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer and dismissed the bill. Plaintiff appealed.

HARRISON, J. * * *

A misjoinder of defendants is no ground of demurrer; that objection can only be taken by motion to strike out the names of such as are improperly joined or sued.

But there was no misjoinder in this case, and the action was properly against all the defendants.

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{ Any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination and settlement of the question involved. Gantt's Digest, sec. 4476.

Here were several creditors seeking to subject the goods claimed by the plaintiff, to the satisfaction of their judgments, and the question involved in controversy, was the validity of the assignment to him in which they had a common interest.

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Judgment affirmed on other grounds.

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other grounds.*

KEYES v. LITTLE YORK GOLD WASHING & WATER COMPANY.

53 Cal. 721. [1879.]

By the court:

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The complaint sets forth that the plaintiff is the owner of certain described premises known as bottom land, situated in the valley, upon the banks of Bear River, about ten miles from where that stream debouches into the Sacramento Valley, and midway between that point and the mouth of the river; that the defendants are miners severally engaged in hydraulic mining at points high up on Bear River and its tributaries—the several mining properties of the defendants lying within a radius of seven miles upon the hilltops adjacent to the river, and being severally wrought and carried on by the respective defendants, and that the several dumps used by the defendants respectively in their mining pursuits are some of them in the bed of the river, others in the beds of steep ravines and gulches immediately contiguous to and leading into the bed of the river and its tributaries; that the tailings of the several mining claims deposited on these dumps are swept down the river by the force of the current until they reach the lands of the plaintiff below, upon which they are deposited, and which they cover so as to destroy the value of the said lands. The prayer is that an injunction issue enjoining the defendants from depositing the tailings and debris of their several mining claims so that they reach the channel of the river, etc.

The defendants appeared to the action, and filed a demurrer

to the complaint upon several grounds—and, among others, upon the ground that there is a misjoinder of parties defendant, in that it did not appear by the complaint that the defendants jointly committed any of the acts complained of, or are acting therein in concert or by collusion with each other, but that, on the contrary, it did appear by the complaint that the defendants had no interest in common in the subject matter of the suit, but were acting severally and without any joinder or co-operation on the part of the defendants, or any of them. The demurrer was overruled by the court below, and the propriety of its action in that respect is brought in question by this appeal.

An injunction is granted when the relief sought consists wholly or in part of restraining the commission or continuance of acts being done or threatened, or when the commission or continuance of acts during litigation will produce irreparable injury, or render a judgment in plaintiff's favor ineffectual. (Code Civil Procedure, section 526). The injunction ordered at the final hearing by the court below was not auxiliary to any other provision of the decree, or added to render some other final order more effective. It was the only decree sought by plaintiff, and is the very most that the allegations of his bill would have entitled him to had the defendants been charged with co-operation and a common design in doing that which each threatened.

There are, indeed, recitals in the complaint alleging plaintiff to have already sustained damages, but no relief is sought upon them as allegations constituting the basis for a decree. They are rather in the nature of statements of evidence tending to sustain the averments that like damages will occur in the future, unless defendants are restrained. In the case of a demurrer for a misjoinder (even had damages for past injuries been demanded in this case) no judgment for damages could have been rendered against the defendants *jointly*, because they are charged each to have committed a tort severally; and several judgments for damages could not have been rendered against each defendant, in the same action, for such judgments would have demonstrated a misjoinder.

No damages are claimed in the prayer for judgment or in the "points" of counsel. The wrong complained of is that each of the defendants, acting for himself, and not in collusion with or combination with any other, threatens to continue to deposit the tailings from the workings of the mine in such position, on or

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no damages asked for

adjacent to his own premises, as that, from natural causes, they will flow down or be forced down upon the plaintiff's premises.

If a nuisance was created by the exposure of the dumps to the action of the waters of Bear River and its tributaries, a nuisance was committed by each of defendants, when he—disconnected from the others—made or threatened such deposit; or, if it be said that the matter of the reasonable use of the stream can enter into the inquiry, there could be no nuisance by any of the defendants who had made only a reasonable use.

In either view of the case, there is a misjoinder of parties defendant. The bare statement would seem to prove the proposition, since the very essence of the objection of a misjoinder of a defendant with others is that he is not connected with or affected by the single cause of action, if there is but one, or that he is not connected with or affected by one or more of several separate and distinct causes of action, if several are alleged. If any one of these defendants was liable to be enjoined, he could have been enjoined in a separate suit, the subject matter of such suit being the alleged threatened wrong. If anyone of the defendants is not liable to be enjoined in a separate suit, he cannot be made liable in an action like the present; for there is no principle of equity which would make a man responsible for a wrong which he has neither done nor threatened, merely by joining him with other defendants who may independently have threatened a similar wrong.

Several cases were cited by the counsel for respondent which it was claimed would sustain the joinder of the defendants in this action, but an examination will clearly distinguish them from the present. *Mayor of York v. Pilkington*, 1 Atk. 282, was a bill of peace to prevent a multiplicity of suits. In a certain sense, all bills of peace are intended to prevent multiplicity of suits, but it is a *non sequitur* to assert that wherever the result of assumed jurisdiction by a court of equity will relieve the plaintiff of the inconvenience of bringing several separate actions at law or suits in equity, the complaint is to be termed a bill of peace. In *Mayor v. Pilkington*, a bill was *brought to quiet the plaintiffs in a right of fishery* in the River Ouse, of which *they claimed the sole fishery* “of a large tract” against the defendants, who, it was suggested by the bill, *claimed several rights*, either as lords of manors or occupiers of adjacent lands. The main question was whether, in view of the fact that there was no privity between the defendants, the bill could be main-

tained. Holding the affirmative on this proposition, the court of chancery was authorized to retain the cause for other purposes. But the gravamen of the bill was not that the defendants were several and separate trespassers (the view upon which the demurrer was sustained at the first argument,) but was that the plaintiff had an exclusive right against which defendants were asserting adverse rights. The proceeding was analogous to our action to quiet title. The present case more resembles *Dilley v. Doig*, 2 Vesey, Jr. 486, in which the proprietor of a copyright sought to restrain in the same suit several and independent infringements of his right by different persons. In that case there was no allegation in the bill of a claim of right on the part of the defendants to sell copies of the spurious edition of the book, and, from the nature of the circumstances detailed, there could have been no such allegations. The defendants were alleged to be severally wrongdoers without any combination. The Lord Chancellor said: "The right against the different booksellers is not joint, but perfectly distinct; there is no *privity*." The subject matter of the bill was a wrong done by each of the booksellers; its object was not to obtain a final determination that the plaintiff had the exclusive right, and that the defendants had no right (for it was not asserted that they claimed any) but, as in the present case, simply to enjoin wrongs threatened by the defendants severally, and not *jointly*." In *Whaley v. Dawson*, 2 Shoales & L. 367, a demurrer was *sustained*, "for that it appeared by said bill that the same was exhibited against the defendants and one Michael Carraher for several and distinct causes and matters, that have no relation or dependencies on each other." In *Brinkerhoff v. Brown*, 6 Johns. Ch. 137, Chancellor Kent remarks: "There was a series of acts on the part of the persons concerned in the 'Genesee Company,' all produced *by the same fraudulent intent*, and terminating in the deception and injury of the plaintiff. The defendants performed different parts in the same drama; but it was still one piece—one entire performance, marked by different scenes." All the defendants (except such as were parties necessary to the final determination of the issues between plaintiffs and those who had taken part in the fraud) had been actors in a greater or less degree in carrying out the common fraudulent design. The case would have been more analogous to the present, if here the several defendants had been charged with threatening the injury in pursuance of a purpose adopted by a common agree-

ment. It is claimed that New York & New Haven Railroad Company v. Schuyler, 17 N. Y. 603 (34 N. Y. 45), is strongly in point. But that was a case where the plaintiffs claimed a right to have certain stock canceled as having been fraudulently issued, and the defendants, as the complaint alleged, "all claimed rights; * * * all asserted a claim upon the company in some form." (17 N. Y. 594-595.) The case was determined upon its analogies to a bill to *quiet title* and to *remove a cloud*. The learned judge likened it to a case of an individual clothed with the legal title to the railroad property, receiving its gross earnings for the purpose of dividing the net profits among a large number of individuals whose rights were evidenced by certificates of stock. In such a case, if a new class should come forward claiming the same rights, and presenting instruments of the same kind as the certificates, bearing on their face all the evidences of genuineness, but in fact unauthorized and spurious, it would be the right and duty of the *legal owner* (upon settled principles of equity) to call the false claimants into Court, in order to remove the cloud upon the equitable interests of those whom he represented. (Ibid. 598).

It is unnecessary to dwell upon the analogies between the cases of N. Y. & N. H. R. R. Co. v. Schuyler, and the Mayor of York v. Pilkington, or on the very marked differences between the former and the case at bar. In the court of appeals, 34 N. Y., the complaint was expressly characterized as "a bill of peace, to quiet titles, settle rights, and prevent a multiplicity of suits." An examination of Thorpe v. Brumfit, Law R. Ch. App. Cases, vol. 8, shows that the parties all had a contract relation with each other, by reference to which their respective rights were to be determined; and further, that no question of joinder was raised, but, on the contrary, the defendant's *all answered together*, insisting that they all had a certain right of way, to be exercised in a reasonable and proper manner (p. 653). In People v. Morrill, 26 Cal., the objection was that there was a misjoinder of plaintiffs. It was held (and apparently admitted) that all the plaintiffs were properly joined, so far as relief by cancellation of the patent was concerned, and it was said that the demurrer should be overruled because too general.

We think the distinction between the case at bar and the other American cases cited by the respondent—Gaines v. Chew, 2 How. 619, amongst them—is equally susceptible of explanation. With respect to the Scotch cases, it is enough to say that, under

the system of law which obtains in Scotland, it would appear that parties and causes of action may be united in a manner not permissible in countries where the common law prevails; the inconveniences and evils resulting from the joinder of parties without community of interest being there avoided by a system which allows the "conjunction" of causes and the submission of special issues to the triers of fact.

At law, where an action for tort is brought against several co-defendants, it is essential that the wrong complained of be joint. (Dicey on Parties 449). This rule is thoroughly understood, and is not disputed. If there are any exceptions in equity they have not been called to our attention. We are convinced that none can be found which will authorize the joinder of defendants attempted in the proceeding before us. We have no doubt that the objections to the complaint above considered could properly be presented by a demurrer on the ground of misjoinder of parties defendant.

Judgment and order reversed and cause remanded, with directions to the court below to sustain the demurrer to the complaint. Remittitur forthwith.

for def.

WINSLOW v. DOUSMAN.

18 Wis. 457. [1864.]

Appeal from the Circuit Court for Milwaukee County.

The complaint in this action avers that in October, 1863, the plaintiff recovered in said circuit court a judgment against George D. Dousman for \$4,576.85 damages, in an action on express contract; that the judgment was duly docketed with the clerk of said court in November following, and execution duly issued thereon, on which the sheriff made return of *nulla bona*; that the judgment remained wholly unsatisfied at the commencement of this action; that said defendant George D. Dousman had a considerable amount of notes, due bills, bonds and mortgages, contracts, accounts, money, legal and equitable debts, claims and demands due him from different persons (whose names were to the plaintiff unknown), and that he had goods, chattels, lands, tenements, leasehold interests in real estate, etc., either in his possession or held in trust for him, which plaintiff

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was unable to reach by execution, and which ought to be appropriated to the payment of his judgment; which property plaintiff feared said defendant would make away with or place beyond the reach of the court, unless restrained by injunction. The complaint further avers that at the time of contracting the debt on which said judgment was founded, and on the 1st of May, 1861, said George D. Dousman was the owner of certain described real estate in Milwaukee county; that on the day last mentioned, he conveyed certain specified portions of said real estate to his son Henry M. Dousman without any consideration; that on the 10th of the same month, said George D. and his wife, Martha A. Dousman, conveyed by warranty deed to said Henry M. Dousman, certain other specified parts of said real estate, certain of which were occupied by George D. Dousman and his wife as a homestead; that on the same day Henry M. Dousman conveyed the same property by warranty deed back to said Martha A. Dousman; that said conveyances from George D. to Henry M. and from Henry M. to Martha A., were all without consideration, and were made in fraud of the rights of plaintiff as creditor; and that the real property so conveyed constituted at the time of such conveyance, all the property of value belonging to said George D. out of which plaintiff could make the amount of his judgment aforesaid; that said Henry M. and Martha A. well knew the fraudulent intent of George D. in making said conveyances, and that the property so conveyed ought to be appropriated toward the payment of plaintiff's said judgment. Judgment is therefore demanded, that a receiver of all the property and effects of George D. Dousman be appointed by the court; that said George D. might be directed to assign and transfer to such receiver, upon oath, under the direction of a master of the court, all his property, equitable interests, things in action, money and effects, and all the books and papers relating thereto, and the evidences thereof; that out of said money, etc., plaintiffs might have satisfaction of said judgment; that said George D., his attorneys, etc., might be enjoined from collecting, selling, etc., or in any manner using, encumbering or disposing of, any demands due him, or any real or personal estate, whether in his own possession and held in his own name, or held by some other person for his use; that the defendants Henry M. and Martha A. Dousman be restrained, until the further order of the court, from in any manner disposing of the lands conveyed to them as hereinbefore stated;

that said receiver be ordered to take possession of and to sell all the property of George D. Dousman (except so much of the real estate conveyed as above described as was occupied by him for a homestead), or so much thereof as might be necessary, and apply the proceeds to the payment of plaintiff's said judgment, with the costs and charges of this suit, or that the conveyances above described be adjudged fraudulent and void, and the property be subjected to sale on execution to satisfy said judgment.

The defendant Martha A. Dousman demurred to the complaint on the grounds that Henry M. Dousman was improperly joined as defendant therein; that several causes of action were improperly united, which did not all of them affect all the parties, and which were not separately stated; and that the facts stated did not constitute a cause of action against her. The demurrer was overruled, and said defendant appealed.

By the Court, COLE, J. We have no doubt that the legislature by the passage of chapter 303, Laws of 1860, intended to restore the remedy by creditor's bill substantially as it had existed under chapter 84, R. S. 1849. The law of 1860 was passed immediately upon the decision in *Graham v. LaCrosse & Milwaukee R. R. Co.*, 10 Wis., 459, being announced, wherein it was held that the remedy by creditor's bill, as it had theretofore existed, had been superseded by the supplementary proceeding under the code; and the manifest object of the act was to restore the former remedy. No other conclusion is admissible in view of the history of legislation upon this subject. And I am confident that in some unreported case, the title of which I am unable to recall, this precise point has already been decided by this court. However this may be, the language used in the first section of the law of 1860 is almost identical with that employed in section 7, ch. 84, R. S. 1849, and a clearer case of an intention to restore the former remedy can hardly be presented. The point, therefore, that the remedy given by ch. 303 is something different in its scope and purpose from the old remedy by creditor's bill, cannot be successfully maintained.

The question then arises, is the complaint in this case good under the old practice? The principal objection taken to the complaint by the appellant is, that it professes to set out three causes of action of distinct natures, against three defendants not connected in interest. It is argued that the complaint states one cause of action against George D. Dousman, in the nature

of a general creditor's suit under chapter 303, Laws of 1860; another against George D. and Henry M. Dousman, to have the conveyance of lot 1, block 19, declared void as to creditors, and subject the property to the payment of the judgment mentioned in the complaint; and a third against George D. and Martha A. Dousman, to have another conveyance of other real estate likewise declared void as to creditors, and subject that to the payment of the same judgment. The object of the suit then is, to reach property which the judgment debtor George D. Dousman has fraudulently conveyed to his son Henry M., and a portion of which the latter conveyed to his mother Martha A., wife of George D., for the purpose of placing it beyond the reach of creditors. The claim against all is of the same nature, that all the defendants have combined and acted in concert in these fraudulent transactions, and "all have a common interest centering in the point in issue in the cause." So that, while the title to one piece of property is in one defendant, and the title to some other distinct piece in another defendant, yet these various titles were taken and are now held for a common purpose, and to accomplish the same fraudulent end. All are privy to and have been concerned in acts tending to the same illegal result. The matters are not distinct, but are, in truth, all connected with the same fraudulent transaction, in which all the defendants have participated. Where this is the relation of the defendants, it has been held that they may be joined in the same suit. In the case of *Fellows v. Fellows*, 4 Cowen, 682, this whole subject in regard to multifariousness in a creditor's bill is most ably discussed, and the authorities reviewed. The rule deduced from the cases was, that "where several persons, although unconnected with each other, are made defendants, a demurrer will not lie if they have a common interest centering in the point in issue in the cause." p. 700. The allegations in this case bring the case fully within the reach of that principle. Here the defendants were connected in the same purpose, and have a common interest in the point in issue. We do not think there is any improper joinder of defendants, or of causes of action, in the complaint.

The order of the circuit court, overruling the demurrer, is affirmed.

for plain

HILLMAN V. NEWINGTON.

57 Cal. 56. [1880.]

SHARPSTEIN, J.: The respondent Hillman brought an action against eight defendants, the appellants herein, and alleged that he was entitled, by virtue of a prior appropriation, to 1,600 inches of the water flowing in a stream known as Willow Creek, and that the appellants diverted the waters of said creek from the natural channel thereof, so as to prevent them from flowing into the plaintiff's ditches, and thereby deprived him of the water to which he was entitled. He further alleged, that the defendants threatened, and intended unless restrained by an order of the court, to continue said diversion and deprivation, and prayed that they be enjoined from so doing. There are other allegations of damages, and a demand of judgment therefor. Most of the material allegations of the complaint are specifically denied by the defendants. They first "deny that they have any joint interest in the subject matter of this action, or that they have jointly done any act or thing mentioned in the complaint; or that they are jointly liable to the plaintiff in any matter or thing connected with or growing out of the subject matter of the action, either of the matters or things mentioned or set out in the complaint, or of the matters hereafter mentioned and set out in this answer."

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"And the defendants aver, that their rights and interests in all matters connected with the subject matter of this action are separate and independent of each other, and that for these reasons they are improperly joined as defendants in this action."

Afterwards they allege, that each of the defendants is the owner and in the actual possession of a separate and distinct tract of land; and that each of them has, without any connection with any other, diverted a distinct and separate part of the water of said creek for his individual use. In other words, that they have acted severally and not jointly, in the premises.

The court found, that the right of the plaintiff to 400 inches of the waters of said creek, measured under a four inch pressure, were prior and paramount to the rights of the defendants, or any of them, in said waters; and that the defendants had severally, and not in concert, diverted said waters to such an extent that said 400 inches "did not pass down to the heads of plaintiff's ditches." The judgment of the court is, that the defend-

ants be perpetually enjoined from "diverting said waters, or any part of them, from their natural channel, during the months of April, May and June of each year, to such an extent as that 400 inches of water, measured under a four-inch pressure, shall not pass down the channel of Willow Creek below the head of the defendant Newington's ditch and to the head of the plaintiff's upper ditch;" and that the plaintiff recover of the defendants \$1 damages, and the costs of suit, taxed at \$787.91; and that as between the defendants, the costs and damages should be apportioned. From that judgment, the defendants appeal.

The point most strongly pressed upon our attention by appellant's counsel is, that there is a misjoinder of parties defendant, because they did not act jointly or in concert in diverting the plaintiff's water. It does appear, however, that the plaintiff is entitled to a certain quantity of water, of which he is deprived by the defendants. None of them have a right to use any of the water of Willow Creek, unless there is more than four hundred inches flowing in it. If there be more than the amount flowing in it at any time, the plaintiff has no interest in the surplus. What the respective rights of the defendants may be in it in no way concerns him.

It is not at all improbable that no one of the defendants deprives the plaintiff of the amount to which he is entitled. If not, upon what ground could he maintain an action against any one of them? If he were entitled to all the water of the creek, then every person who diverted any of it would be liable to him in action. But he is only entitled to a certain specific amount of it, and if it is only by the joint action of the defendants that he is deprived of that amount, it seems to us, that the wrong is committed by them jointly, because no one of them alone is guilty of any wrong. Each of them diverts some of the water. And the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by anyone would not. It is quite evident, therefore, that without unity or concert of action, no wrong could be committed; and we think that in such a case, all who act must be held to act jointly.

If there be a surplus, the defendants can settle the priority of right to it among themselves. That can in no way affect the plaintiff's right to the amount to which he is entitled. It does not seem to us that the defendant's answer, that each one of

them is acting independently of every other one, shows that the wrong complained of is not the result of their joint action; and if it does not, the answer in that respect is insufficient to constitute a defense. The case, so far as we are advised, is *sui generis*. No parallel case is cited by either side. The objection that the judgment does not apportion the payment of the damages and costs equally between the defendants, can be obviated by a modification of the judgment in that respect. And it is ordered that it be so modified; and with that modification it is affirmed.

Judgment affirmed.

for plain.

BORDEN v. GILBERT.

13 Wis. 670. [1861.]

By the Court, COLE, J. This action was commenced in November, 1859, to foreclose a mortgage. The mortgage was given by Gilbert and wife to their co-defendant, Jeremiah R. Davis, to secure the payment of two promissory notes. The complaint states that the notes and mortgages were assigned by Jeremiah R. Davis to the respondent; and that the other defendant, Jeremiah Davis, for a valuable consideration expressed on the face of an instrument in writing signed by him, guaranteed the collection of the notes. There was no appearance by any of the defendants, and judgment by default was rendered for the sale of the mortgaged premises, and also for a personal judgment against the mortgagor, Gilbert, the assignor, Jeremiah R., and the guarantor, Jeremiah Davis, for any deficiency which might be found due after the security was exhausted. And the question arising upon the record is: Could the guarantor properly be made a party to the suit for the foreclosure of the mortgage, and was it regular to render a personal judgment against him in that action, for any deficiency which might be found due? Or, should the respondent first have exhausted his remedy upon the notes and mortgage before he could resort to his action upon the guaranty? In the case of *Dunkley v. Van Buren*, 3 Johns. Ch. R., 330, Chancellor Kent stated that a party, on a bill to foreclose a mortgage, was confined in his remedy to the pledge, and that such a suit was not intended to act in personam, and he therefore denied an application to incorporate in the decree a provision that the mortgagor pay any deficiency found due by a

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given day, or that execution issue against his other property. And it is very obvious that if a bill to foreclose a mortgage had been understood at once to give a remedy *in rem* and *in personam*, the books would not abound with cases where the question has arisen whether a mortgagee could proceed at law upon his bond, at the same time that he was prosecuting his suit in equity, or as to what would be the legal consequences of bringing his action at law after foreclosure, since there would have been no occasion for any such discussion, nor any necessity for any action on the bond. Judgment might have been given against the mortgagor in the chancery suit at the same time that a decree was rendered for the sale of the mortgaged property. It was undoubtedly to obviate this difficulty, and to prevent a multiplicity of suits, that the legislature of New York provided that in a suit to foreclose a mortgage, the court should have the power to decree and direct the payment by the mortgagor of any balance of the mortgage debt. 2 N. Y. R. S. 191; 8 Paige, 480. It was also provided that if the debt was secured by the obligation of any other person besides the mortgagor, such person might be made a party to the suit, and that the court might decree payment of the balance of such debt remaining unsatisfied, after the sale of the mortgaged premises, as well against such other person as against the mortgagor. Section 154. Under this section it has been held, that a mortgagee who assigns the mortgage and guarantees the principal and interest, is a proper party to the foreclosure suit. *Bristol v. Morgan*, 3 Edw. Ch. R. 142; *Leonard v. Morris et al.*, 9 Paige, 90. And where the holder of the mortgage assigned it and covenanted with the assignee that it was due and collectible, and afterwards took a bond of a third person as security for the mortgage debt, it was held that the assignee was in equity entitled to this security, and that in a suit by him to foreclose, the obligor was properly joined as a defendant, in order that a decree might be made against him for any deficiency after the sale of the property. *Curtis et al. v. Tyler et al.*, 9 Paige 432. So when the purchaser of a portion of land mortgaged, assumed the whole mortgage, it was decided that the mortgagor was entitled to the benefit of such agreement, and that it was within the equity of the statute to give a decree over for the deficiency, against the third party liable for the payment of the mortgage debt. *Halsey v. Reed*, 9 Paige 446. See also *Mann v. Cooper*, 1 Barb. (Ch.) 186; *Stone v. Steinbergh*, id. 250; *Bigelow v. Bush*, 6 Paige 343;

Vanderkemp v. Shelton, 1 Clark's Ch. R. 321; Luce v. Hines, id. 453.

Whether in some of the decisions in the above cases the statute was not extended so as to embrace cases not fairly coming within its provisions, we will not stop to inquire. It is sufficient to say that these provisions of the N. Y. statutes, which were substantially incorporated in ch. 84, R. S. 1849, have been left out of the present revision. We are therefore to determine, whether, in the absence of these provisions, it is regular and proper to make a third person who has guaranteed the collection of the mortgage, a party to the suit to foreclose the mortgage. We are of the opinion that it is not. The plain, obvious import of the guarantor's contract is, that he will pay the debt, provided, on due diligence, it cannot be collected out of the mortgagor, or made out of the security. It is not an absolute promise to pay in the first instance. The respondent should exhaust his remedy against the mortgagor and the mortgaged property, before he can call upon the guarantor to make good his contract. The former are the primary sources to which he must look for the payment of his debt. If they fail or prove inadequate, then the guarantor becomes liable. It was therefore improper and erroneous to make the guarantor a party to this suit, and to take a personal judgment against him, under the allegations of the complaint. The respondent should first have exhausted his remedy upon the notes and mortgage, before proceeding against the guarantor, Jeremiah Davis.

The judgment of the circuit court must be reversed, and a new trial ordered.

for def

(b) *Parties Who Must be Joined.*

BLEDSON v. IRVIN.

35 Ind. 293. [1871.]

BUSKIRK, J. The action in the common pleas court of Bartholomew county, from which this appeal was taken, was to obtain judgment on a note, and to foreclose a mortgage given to secure the same.

The only question arising in the case is upon the sustaining of a demurrer by the court below to the answer in abatement. The

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note upon which the action was brought was signed as follows: "L. S. Bledsoe, E. H. Cox & Co., Samuel Stuckey."

The answer in abatement above referred to, was as follows, after entitling the cause, viz.: "Defendants, for answer in abatement herein, say that plaintiffs ought not to maintain said action, because, they say that the said note in the said declaration mentioned (if any such was made), was made by one Elizabeth Kinney jointly with said defendants, and not by said defendants alone, and that said Elizabeth Kinney is still living, to-wit, at said county of Bartholomew, State of Indiana; wherefore, because said Elizabeth Kinney is not named in said complaint, nor made a party defendant in this action, they pray judgment herein that said action abate.

(Signed.)

L. S. BLEDSOE.

Subscribed and sworn to March 22d, 1869.

G. W. RICHARDSON, N. P.

To this a demurrer was filed, for the alleged reason that it did not state facts sufficient to constitute a defense. This error we think is fatal to the judgment below. The note on its face is a joint note. At common law, all makers of a joint contract must have been joined as parties defendants, and the failure of plaintiff to join any one was cause of demurrer, if it appeared in the complaint, and of plea in abatement if it did not so appear. Such was the uniform ruling of this court; Bragg v. Wetzel, 5 Blackf. 95; Dillon v. State Bank, 6 Blackf. 5; Wilson v. State, 6 Blackf. 212, and authorities cited in the last two cases; Gilman v. Rives, 10 Pet. 298. Nor has the code changed the rule, 2 G. & H. 46, sec. 18; id. 79, clause 4, and note thereto.

Even if this case were to be considered as embraced within the principle laid down in Goodnight v. Goar, 30 Ind. 418, that "the code seems to have re-enacted the rules which prevailed in courts of equity, as to who must join as plaintiffs, and may be joined as defendants," still the plea in abatement in this action, under equitable rules, was good. The answer was pleaded by all the defendants who had been summoned, including Stuckey, whom the record shows to have been a surety on the note. As such he had rights over against all the other makers of the note, in the event of his having anything to pay thereon; and in all cases of that character, it is said to be the rule in equity, that all parties so consequentially liable, must be brought before the court. 1 Daniel's Ch. Pr. 329. And in accordance

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with this principle, is the decision of Hardy v. Blazer, 29 Ind. 226, and also in Braxton v. State, 25 Ind. 82.

But it is insisted by the appellee, that the ruling of the court was not erroneous, for the reason that the plea in abatement was defective in not showing how and in what manner Elizabeth Kinney had become a maker of the said note. The plea alleged that she was a joint maker of the note, and the demurrer admitted that this is true. Pleadings should contain facts and not evidence. We think the court erred in sustaining the demurrer to the plea in abatement. *Plea in abatement states she was a maker, but to show her joint maker but this was waived by demurrer*

The judgment is reversed with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the plea in abatement, and for further proceedings not inconsistent with this opinion.

for def.

BRADY v. BALL.

14 Ind. 317. [1860.]

WORDEN, J. Suit by the appellee against the appellants, to recover damages for injuries done by trespassing animals. Verdict and judgment for the plaintiff, a new trial being denied. The material facts are as follows: A lot of cattle belonging jointly to the defendants and one Jefferson D. Brady were being pastured by their owners in a field belonging to one Stockton. They broke through the partition fence between the field of Stockton and the premises of Robert Foresman, and entered the latter, thence through the partition fence between Foresman's premises and the plaintiff's wheat field, and thence into his corn field, eating and otherwise destroying the plaintiff's corn and wheat. *action in tort for trespass of cattle no joint owners as defts*

At the proper time, the defendants asked the court to charge the jury that, if they found from the evidence that the cattle belonged to the defendants and Jefferson D. Brady, they should find for the defendants. This was refused and exception taken. This instruction was correctly refused. The action was for a tort, and the plaintiff had his election to sue all, or only a part, of the owners of the cattle. Chit. Pl. 86. Vide, also, Perk. Pr. 144. *no injury as plaintiff can sue in any joint tort because*

Judgment affirmed.

for plain

CREED v. HARTMAN.

29 N. Y. 591. [1864.]

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The defendant was one of a firm who had contracted to build a block of houses on Third Avenue in the City of New York. The contractors made a sub-contract with one Brady, to make all the necessary excavations, by digging the ground, blasting the rocks, etc. He was to guard against accidents by proper precautions, and all damages were to be made good by him. After the sidewalk was dug out the same was covered with boards, but by whom does not appear. The defendant's foreman was in the habit of putting up guards at evening. Mary Creed, one of the plaintiffs, in passing over the platform, broke through and fell into the excavation. She was injured, and her thigh was fractured. The counsel for the defendant asked the court to charge that where a party had a license to construct a sewer, and contracted it to a third party, he was not liable for an accident occurring through the negligence of such party. This was refused; and the court charged "if the excavation was caused by the party sued he was responsible for not having the excavation properly protected, although he might not be liable had the accident occurred while the blasting was going on." To this the defendant excepted. The defendant also moved for a non-suit, upon the ground that Brady was the party guilty of negligence, if any; that the plaintiff was guilty of negligence, and that the partner of the defendant was a necessary party. This motion was denied. The jury found a verdict for the plaintiff, and the judgment thereon was affirmed by the general term.

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INGRAHAM, J. There was not sufficient evidence of negligence on the part of the plaintiff to warrant the court to take the case from the jury. It did not appear that she had any reason to suppose the boards placed for people to walk over were not sufficient. On the contrary, she saw others passing, and, as it was usual to make such bridges to pass over excavations in the sidewalks, she had no reason to suppose there was any difference in the present case. It is only where the negligence is clearly proved, that the court is warranted in dismissing the complaint. The defendant was one of a firm who had the contract for erecting the buildings. Both of the parties were alike guilty of negligence, and both might have been sued for such negligence, but

each of them was equally liable, if any liability existed; and there is no rule which makes both parties necessary parties to an action of this character. There was a separate liability as well as a joint one, and the plaintiff might, at his election, sue both or either of them. (14 John. 426.) * * *

But there is a joint as well as a several liability, & the plaintiff can sue at his election

SELDON, J. The verdict of the jury, under the appropriate charge of the court on the subject, is an answer to the position of the defendant's counsel that the plaintiff was guilty of negligence. If the question were an open one, however, it would be very difficult to find in the evidence anything to justify a different verdict.

There is no well-grounded reason for questioning the defendant's liability in this case, under the rule laid down in the case of Congreve v. Smith (18 N. Y. 79), that "persons who, without special authority, make or continue a covered excavation in a public street or highway, for a private purpose, should be responsible for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, there being no negligence by the parties injured." It cannot be material whether the excavation was a covered or an open one, where it was made without authority, and the party injured was free from fault. * * *

The ground upon which I have placed the liability of the defendant, furnishes an answer to the objection, that his partner (Eberspacher) should also have been made a defendant. The making of the excavation without license, was a tort on the part of both the defendant and Eberspacher, and the liability for torts committed by more than one person is always several as well as joint. (Low v. Mumford, 14 Johns. 426.) I doubt whether the rule would be different if the liability of the defendant should be held to depend upon the negligence of the common agent of him and his partner. (Champion v. Boswick, 18 Wend. 185-6.) * * *

All the other judges concurring, judgment affirmed.

for claim

BAUM v. MULLEN.

47 N. Y. 577. [1872.]

Appeal against
 for fraud
 husband
 acting as
 agent.

Appeal from the judgment of the general term of the supreme court in the second judicial department, affirming judgment entered upon verdict in favor of plaintiffs, affirming order denying motion for a new trial.

This action was brought to recover damages for alleged fraud in the sale of land. The representations claimed to be fraudulent were made by the husband of the defendant, he acting as her agent in the sale of the premises, the title of which was in her. At the close of the evidence, defendant's counsel moved for dismissal of the complaint, on the ground that the action could not be maintained against defendant without joining her husband as defendant. Motion denied and defendant excepted.

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CHURCH, Ch. J. The only question presented for our decision is whether the joinder of the husband with the wife is necessary in an action for fraud in a contract for the sale of real estate of the latter made by the former as the agent of his wife. We are of the opinion that such joinder is not necessary. The statutes of 1860 and 1862 provide that "the wife may sue and be sued in all matters *having relation* to her sole and separate property, the same as if she were sole," and judgment may be enforced against her separate property as if she were sole. (Laws of 1862, p. 344.)

The counsel for the appellant claims that at common law the husband is liable for the torts of the wife, and that this act has never been changed. This position is correct. The statute has not altered the common law liability of the husband for the mere personal torts of the wife, but when such torts are committed in the management and control of her separate property, the rule is changed, and she is liable the same as if she was unmarried, and can be sued in the same manner.

In this case it is found that by the fraudulent representations of the husband, acting as the agent of the wife in contracting for the sale of her property, \$200 was received, which it is presumed was paid to her. She is responsible for the fraud and has had the avails of it. The action is clearly for "matters having relation to her sole and separate property."

They relate to the management and disposition of her property. The circumstance that the fraud was committed by her

husband, acting as her agent, does not impair her liability. She had a right to employ her husband as agent, and, while acting as such in relation to her separate property, her liability for his acts is precisely the same as it would be for the liability of any other agent. The statute has in a great degree abrogated the respective common law rights, obligations and duties of husband and wife growing out of the marriage relation, as it respects property which the wife is permitted to own. As to such property, she is to be treated as unmarried. All the rights of an unmarried woman are conferred upon her, and all correlative obligations are imposed.

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The statute has decreed equality of rights, and equality of obligations and duties, and courts have no alternative but to enforce both. The wife is liable in the same manner and to the same extent for frauds or torts committed in the management of her property, as she is upon contracts relating to it, and just as liable for fraudulent representations upon the sale of it as upon a covenant for quiet enjoyment.

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In *Rowe v. Smith* (45 N. Y. 230), this court held that the wife was liable for trespass committed by her hogs and cattle escaping from her lands upon the premises of another, and the same principle is applicable to this case. But the principle here decided does not affect the common law liability of the husband for the mere personal torts of the wife disconnected from the management of her separate property.

The judgment must be affirmed with costs.

for plain.

FLESH v. LINDSAY.

115 Mo. 1. [1893.]

Action against Jane Lindsay and husband for damages to the plaintiff's building, alleged to have been caused by the negligence of Mrs. Lindsay in making some alterations of her own building. There was a verdict and judgment against the defendant Jane Lindsay alone, from which she appealed.

BURGESS, J.*

III. In no event is Mrs. Lindsay alone to be held liable for

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the damages sued for, but she is liable in conjunction with her husband.

IV. For the error of the court in giving instructions for plaintiff as herein indicated, and in rendering judgment against Mrs. Lindsay and not against her husband, the cause will be reversed and remanded to be proceeded with in accordance with the views herein expressed.

Judgment reversed.

for def.

AGARD v. VALENCIA.

39 Cal. 292. [1870.]

This was an appeal from a final judgment in favor of the defendants, rendered upon a demurrer to the amended complaint. The action was to compel specific performance of a contract with Valencia to convey an undivided interest in real estate. It was alleged that Valencia had conveyed to each of her children, by deed of gift, four hundred acres of land, amounting in the aggregate thirty-two hundred acres, and fraudulently conveyed the whole of the remainder, except four hundred acres, to the defendants, Blum and Brown, who took the conveyance with notice of the plaintiff's equities. The action was brought against Valencia, Blum and Brown.

CROCKETT, J.

The third ground of demurrer, is also well taken. The children of Valencia ought to have been made parties defendant. The plaintiff is entitled on his own showing, only to an undivided interest in the whole tract, and not to any specific parcel. He has not the right to elect to take his share of the whole out of that part which has been conveyed to these defendants to the exclusion of the portion conveyed to the children; nor has he the right, in a separate action against Blum and Brown, to compel them to convey to him three-tenths, undivided, of the interest which they acquired from Valencia, leaving him to assert his right against the children in another action. There was but one contract and one cause of action under it, and this cannot be split up in several actions against grantees, claiming under a common grantor. It must all be settled in one action, so that the rights of all the parties can be adjusted in one proceeding. The children ought therefore, to have been made parties. * * *

Judgment affirmed.

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PILLOW v. SENTELLE.

39 Ark., 61. [1882.]

EAKIN, J. This suit was brought by Sentelle & Co., to foreclose a mortgage on land executed on the seventeenth of January, 1876, by Gideon J. Pillow, to secure a note to complainant, for \$5,531.68, due the fifteenth of December following.

In the title of the case, Mrs. Pillow is described as the widow and administratrix of the mortgagor. Fourteen others are named as defendants, but neither their character nor interests in the subject matter, are disclosed by the bill. Most probably they were sons and daughters of the mortgagor, with their wives or husbands, but we cannot know this. They are not described as heirs. * * *

It is impossible to gather from the transcript correct information as to who were Gideon J. Pillow's heirs. This kind of inadvertence is not uncommon, and results generally from the fact that the attorneys are themselves so well advised of the relations of well known parties, that they do not require allegations as to that from their opponents, or overlook the omission. No evil generally results from that in the court below, where all proper matters may be orally conceded in argument, but it is very embarrassing to an appellate court, desiring to do substantial justice, and still confined to the transcript.

But the heirs were necessary parties, and, as the transcript appears, it was not proper, at that stage, for the court to hear the cause, and pronounce any final decree. It was fruitless, since, save a mere dower interest of Mrs. Pillow, if she had any, nothing could be affected by its execution, and it would cloud the title of the heirs, and embarrass their right of redemption. "When a determination of the controversy between the parties before the court cannot be made without the presence of other parties, the court must order them to be brought in." Gantt's Digest, section 4481. The decree was premature, and, for that reason, it would not be proper here, and now, to consider the merits of the controversy between the original complainants and Mrs. Pillow. The heirs have a substantial interest in that, and must first be heard in the court of original jurisdiction. Although they would not be bound by the decree, yet, upon any effort to disturb their title, precisely the same controversy, as to all or some of the points, would have to be renewed. The equity

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practice would fail in its chief excellence, that wherein it most especially commends itself, if it did justice by piecemeal. Its pride is to bring in all parties interested in the subject matter of the controversy, and to adjust all rights at once, and, so far as may be, permanently.

Reverse the decree and remand the cause, with leave to all parties to reform their pleadings, and to bring in all parties in interest, in accordance with this opinion and the principles and practice in equity.*

for def.

WOODWARD v. McCONNAUGHEY.

106 Fed., [C. C. A.] 758. [1901.]

GILBERT, Circuit Judge. The appellants were the complainants in a bill brought to set aside a tax title to their property acquired by J. W. McConnaughey, one of the appellees, and to rescind and set aside a quitclaim deed of said property made to the said McConnaughey by the appellants, on the ground that it was made under mistake, and induced by fraud. The defendants demurred to the bill upon several grounds, one of which was that it appeared from the allegations of the bill that one Isabel C. Jones was a necessary party to the suit, but was not made a party thereto. The demurrer was sustained, and at the same time the complainants were given leave to amend the bill within 30 days thereafter. They failed to amend within the time specified, and thereupon a decree was entered dismissing the bill. From that decree the present appeal is taken.

* * *

Concerning the interest of Isabel C. Jones in the subject of

*In Missouri, the mortgagee has his election to bring an equitable action to foreclose, in which event the general equity rules as to parties prevail, or to bring his actions under the statute against the statutory parties only. Thayer v. Campbell, 9 Mo. 280.

In case of the death of the mortgagor, neither the heirs nor their grantees are necessary or proper parties in the statutory action, but will be bound by the judgment against the personal representative. Tierney v. Spiva, 97 Mo. 98.

In the statutory action the plaintiff may have a personal judgment for the debt, but in the equitable action no personal judgment can be rendered. Smith v. Moore, 53 Mo. App. 525.

the controversy, the bill alleges that prior to February 24, 1895, certain mechanics' liens, amounting to \$8,384, were filed against the property in litigation, and that on that date suit was brought to foreclose the same; that a decree foreclosing said liens was rendered, and that the decree and all rights thereunder were purchased by and assigned to Isabel C. Jones; and that thereafter, in pursuance of said decree, the property was sold and conveyed to the said Isabel C. Jones. The appellants contend that Isabel C. Jones is shown to be an unnecessary party to the suit by other averments of the bill, which allege that the money to purchase said decree was furnished her by J. W. McConnaughey, and that she was a nominal purchaser only, and was in reality acting as trustee for McConnaughey, and that the transaction was carried on in her name solely for the purpose of concealing the facts, and that McConnaughey is a trustee for the appellants under said decree, execution, and sale. These allegations do not change the aspect of the case so far as it concerns the necessity of making Isabel C. Jones a party. The complainants cannot aver that the title to the property which is the subject of the suit is vested in one who is not a party to the suit, and dispense with the necessity of bringing him before the court by averring that his interest is that of a trustee for one of the defendants. The trustee is nevertheless a necessary party. So far as the allegations of the bill are concerned, the decree foreclosing the liens was a valid decree, and the title acquired thereunder is the title to the whole of the real estate which is in controversy in the suit. If it be not true, as alleged in the bill, that the title vested in Isabel C. Jones is held in trust for the appellants, it follows that the court is called upon to deal with property in which neither the appellants nor the appellees have any interest. The court can afford the relief which is prayed for only by finding that Isabel C. Jones holds the title in trust for McConnaughey. This it cannot do unless she is brought into the suit. Equity rule 47, it is true, permits a relaxation of the chancery rule as to parties in cases where a necessary party is without the jurisdiction of the court, or where his joinder would oust the jurisdiction. The Supreme Court has nevertheless repeatedly held that the rule does not enable the circuit court to make a decree which can affect the rights of one who is absent, and that all persons whose interest would be directly affected by the decree are indispensable parties. *Shields v. Barrow*, 17 How., 130, 139, 15 L. Ed., 158;

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Ribon v. Railroad Co., 16 Wall., 446, 450, 21 L. Ed., 367; Williams v. Bankhead, 19 Wall., 563, 22 L. Ed., 184; Kendig v. Dean, 97 U. S., 423, 24 L. Ed., 1061. But in the present suit no case is made for the application of rule 47. No reason is alleged for omitting Isabel C. Jones from the parties defendant. The court is called upon to go no further than to apply the general chancery rule that all those who have an interest in the subject of the controversy, or whose presence is necessary to a determination of the entire controversy, must be made parties. O'Haro v. McConnell, 93 U. S., 150, 23 L. Ed., 840; Kendig v. Dean, 97 U. S., 423, 24 L. Ed., 1061; Sioux City Terminal R. R. & Warehouse Co. v. Trust Co. of North America, 27 C. C. A. 73, 82 Fed., 124. Tested by that rule, there can be no doubt that the demurrer for want of a proper party defendant was properly sustained by the court.

It is unnecessary to consider the other grounds of demurrer. The decree will be affirmed.

for def.

REFORMED PRESBYTERIAN CHURCH v. NELSON.

35 Ohio St., 638. [1880.]

Error to the District Court of Muskingum county.

The original petition was filed in the Court of Common Pleas of Muskingum county, by William S. Nelson and John Nelson, two of the heirs of Susannah Forsyth, deceased, to contest her last will and testament. The legatees, devisees, and executors named in the will were made defendants in the petition, as were also the other heirs of the testatrix, to wit: James Nelson, Sarah Nelson, and Mary Ann Nelson.

The will, among other bequests, gave to David Forsyth the silver watch of the testatrix. After satisfying these bequests the residue of her property was given to the Reformed Presbyterian and Covenant Church; and H. P. McClurken and Marshall Hardesty were appointed executors.

There was no service of process upon the defendants David Forsyth, James Nelson, or Mary Ann Nelson; nor was their appearance in any way effected. A verdict and decree were rendered sustaining the will. * * *

WHITE, J. * * *

2. There was error in trying the issue and in rendering the decree, without the appearance of David Forsyth, one of the legatees, having been effected in the action.

The code, in respect to parties, has adopted, substantially the rules before existing in courts of equity.

Section 40 provides, that: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy can not be had without the presence of other parties, the court must order them to be brought in." S. & C., 958.

The proposition that, where no objection is made by demurrer or answer on account of the defect of parties, the objection is to be deemed as waived, applies only in cases where it is competent for the party pleading to waive the objection. But where the presence of an absent party is essential to the determination of the controversy, the parties can not waive the objection. The court, in such case, must order the party to be brought in. Moreover, in a suit to contest the validity of a will no answer is required. The statute directs what the issue is to be, whether there is an answer or not.

It is the duty of the plaintiff instituting a suit to settle a controversy, to see that the necessary parties are brought before the court.

We are not without adjudications directly on the question now before us.

McMacken v. McMaeken, 18 Ala., 576, was a proceeding in error to reverse a decree setting aside a will. A person named as a legatee in the will was not made a party to the suit, in which the will was set aside. It was held, by the court, that to a bill to set aside a will all the legatees are indispensable parties, and that the omission of one, who is an indispensable party to the bill, is a defect, for which the decree will be reversed on error, although the objection is taken for the first time in the reviewing court. To the same effect is Vancleave v. Beam, 2 Dana, 155, and Rogers v. Thomas, 1 B. Mon., 390.

In the case last named one of the questions stated was, whether there was available error in trying the issue as to the validity of the will when all necessary parties were not before the court. In answering this question, on page 398, the court says: "Two slaves, emancipated by the contested document, were not made parties. They were necessary parties. whose

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rights cannot be concluded by the verdict and decree between other parties. One of the chief objects of such a procedure by bill, was to settle, finally and conclusively, all litigation as to a contested will; and it is the chancellor's duty in such a case to require all persons interested as heirs or devisees to be made parties before he permits a final trial or renders a final decree. Endless litigation and confusion might result from permitting a decree to stand, which can not conclude all persons directly interested in establishing or invaliding the will."

In *Shields v. Barrow*, 17 How., 139, Curtis, J., in speaking of the different classes of parties in equity, describes the third class as follows: "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can not be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

In *Holt v. Lamb*, 17 Ohio St., 375, the effect of the decree setting aside the will was drawn in question in a collateral suit. And it was there held that the parties to the suit in which the decree was rendered were bound by the decree, that it was not void as to them; but that as to all other persons in interest the decree was void. No question arose in that case as to the decree being reversible on error. But as it was held to be void as to some of the persons in interest and binding as to others, in respect to the same property, it would seem to be necessarily erroneous as to the parties to the suit.

In *Singleton v. Singleton*, 8 B. Monroe, 340, a different view was taken of the effect of a decree setting aside a will. And it was held in that case that the verdict of the jury upon a bill filed, contesting a will, must be binding on all interested in the will, or it is not binding upon any. But this case recognizes the authority of *Rogers v. Thomas*, *supra*, in which it was held that the absence of a necessary party to the proceeding setting aside the will, was ground for the reversal of the decree on error. See page 356 of the opinion.

for def.

*Judgment reversed and cause remanded.**

JOHNSON, J., dissenting: The judgment of the court below setting aside the will, is reversed by this court, on the application of the executors and others, who were served and made full

**Wells v. Wells*, 144 Mo. 198, accord.

defense, on the ground that one Forsythe, a legatee, who was a defendant, was not served or otherwise before the court below. No objection was made by any one, on this account, in the common pleas, or after appeal in the district court, before final trial and judgment.

The executors as such, defended for all claiming under the will, and so far as this court is advised, represented Forsythe as legatee. He does not complain and is not even a party before us. Without taking space to state the reason therefor I am of the opinion that under the wills act, and under the civil code, the plaintiffs in error, having made no objection at the proper time, can not ask a reversal of this judgment because Forsythe, a legatee only, was not before the court below.

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HAGAN v. WALKER.

14 How., 29. [1852.]

CURTIS, J., delivered the opinion of the court.

John Hagan & Co. filed their bill in the district court of the United States for the northern district of Alabama, in which they state, that in the year 1834, they recovered a judgment at law in that court against Leroy Pope, for upwards of \$7,000, which is wholly unsatisfied; that a writ of fieri facias, running against the lands, body and goods of the debtor, was regularly issued, and, on the 10th of October, 1834, was returned nulla bona; and from that time to the filing of the bill, there has not been, in that district, or elsewhere, any property of Leroy Pope, out of which the judgment debt could be collected, except certain property afterwards mentioned. The bill further alleges that, about a month before the complainants recovered their judgment at law, Leroy Pope, intending to defraud the complainants, and to hinder them from obtaining payment, made conveyances, both of real and personal estate, to a large amount, to his son, William H. Pope, who was a party to the fraud, and was made a defendant in the bill; that Leroy Pope died in the year 1844, and Samuel Breck, who was appointed his administrator, is also a party defendant. The complainants are averred to be citizens of Louisiana, and William H. Pope and the administrator, citizens of Alabama. The defendants

Bill to
set aside
fraudulent
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having demurred to the bill, it was dismissed by the district court, and the complainant, who is the surviving partner, appealed to this court.

* * *. One other ground, on which the demurrer has been rested, requires notice. The bill alleges that, after the fraudulent conveyances to William H. Pope had been made, he mortgaged the property to Virgil Maxey, as solicitor of the treasury of the United States, to secure the debt of Leroy Pope which William H. Pope assumed to pay, and it avers that this debt has been in part paid by means described in the bill. Virgil Maxey, and subsequently, when he went out of office his successor, Charles B. Penrose, were named as parties to the bill, but they were out of the jurisdiction, no process was served on either of them, and neither ever appeared or answered. The bill prays that William H. Pope may be compelled to pay to the United States the balance due to them, out of the property in question, and that the residue may be subjected to the payment of the complainant's debt, and for other and further relief.

Under the act of Congress of the 28th of February, 1839, 5 Stats. at Large, 321, § 1, it does not defeat the jurisdiction of the court that a person named as defendant is not an inhabitant of or found within the district where the suit is brought: the court may still adjudicate between the parties who are properly before it, and the absent parties are not to be concluded or affected by the decree.

It is obvious, however, that there may be cases in which the court cannot adjudicate between the parties who are regularly before it, for the reason that it cannot bind those who are absent. Where no relief can be given without taking an account between an absent party and one before the court, though the defect of parties may not defeat the jurisdiction, strictly speaking, yet the court will make no decree in favor of the complainant.

The case before us is not one of this character; for although the whole of the relief specially prayed for cannot be granted in the particular mode there indicated, because the United States, not being a party, no account can be taken of the debt due to them from Leroy Pope or William H. Pope, yet, subject to the encumbrance of this debt, and without affecting it in any manner, the property may be appropriated to the payment of the complainant's debt.

It is true, that in *Finley v. Bank of the United States*, 11 Wheat., 306, which was a bill to foreclose a mortgage by sale, Chief Justice Marshall says: "It cannot be doubted that the prior mortgagee ought regularly to have been a party defendant, and that, had the existence of his mortgage been known to the court, no decree ought to have been pronounced in the cause until he was introduced into it." But it could not have been intended by this to say, that a prior encumbrancer was absolutely a necessary party without whose presence no decree of sale could be made, because in that very case the court refused to treat the decree as erroneous, after it had been executed.

In *Delaber v. Norwood*, 3 Swanst., 144, n., in a bill to obtain payment of an annuity charged on land, prior annuitants were held not to be necessary parties. In *Rose v. Page*, 2 Sim., 471, the same rule was applied to a prior mortgagee; and in *Wakeman v. Grover*, 4 Paige, 23, and *Rundel v. Marquis of Donegal*, 1 Hogan, 308, and *Post v. Mackall*, 3 Bland, 495, to prior judgment creditors; and in *Parker v. Fuller*, 1 Russ. & My., 656, persons having encumbrances on real property, which the bill sought to subject to the payment of the debts of the deceased owner, were held not to be necessary parties to the bill. See, also, *Hoxie v. Carr*, 1 Sumner, 173; *Calvert on Parties*, 128.

On the other hand, there are cases in which it has been declared that all encumbrancers are necessary parties. Many are collected in *Story's Eq. Pl.*, 178, n. But we consider the true rule to be, that, where it is the object of the bill to procure a sale of the land, and the prior encumbrancer holds the legal title, and his debt is payable, it is proper to make him a party in order that a sale may be made of the whole title. In this sense, and for this purpose, he may be correctly said to be a necessary party, that is, necessary to such a decree. But it is in the power of the court to order a sale subject to the prior encumbrance, a power which it will exercise in fit cases. And when the prior encumbrancer is not subject to the jurisdiction of the court, or cannot be joined without defeating its jurisdiction, and the validity of the encumbrance is admitted, it is fit to dispense with his being made a party. To such a case the 47th rule for the equity practice of the circuit courts of the United States is applicable, and by force of it, this cause may proceed without making the United States, or the solicitor of the treasury, a party to the decree.

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The decree of the district court may be reversed, and the case remanded, with directions to overrule the demurrer, and order the defendants, other than the representatives of the United States, to answer the bill.

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SHIELDS v. BARROW.

17 Howard, 130. [1854.]

CURTIS, J., delivered the opinion of the court.

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To make intelligible the questions decided in this case, an outline of some part of its complicated proceedings must be given. They were begun by a bill in equity, filed in the circuit court of the United States for the eastern district of Louisiana, on the 19th of December, 1842, by Robert R. Barrow, a citizen of the state of Louisiana, against Mrs. Victoire Shields, and by amendment against William Bisland, citizens of the State of Mississippi. The bill stated, that in July, 1836, the complainant sold certain plantations and slaves in Louisiana, to one Thomas R. Shields, who was a citizen of Louisiana, for the sum of \$227,000, payable by installments, the last of which would fall due in March, 1844.

That negotiable paper was given for the consideration money, and from time to time \$107,000 was paid. That the residue of the notes being unpaid, and some of them protested for non-payment, a judgment was obtained against Thomas R. Shields, the purchaser, for a part of the purchase-money, and proceedings instituted by attachments against Thomas R. Shields and William Bisland, one of his indorsers, for other parts of the purchase-money then due and unpaid. In this condition of things, an agreement of compromise and settlement was made, on the 9th day of November, 1842, between the complainant, of the first part, Thomas R. Shields, the purchaser, of the second part, and six indorsers on the notes given by Thomas R. Shields, of the third part. Of these six indorsers, Mrs. Shields and Bisland, the defendants were two. By this new contract, the complainant was to receive back the property sold, retain the \$107,000 already paid, and the six indorsers executed their notes, payable to the complainant, amounting to thirty-two thousand dollars, in the manner and proportions following, as stated in the bill:

"The said William Bisland pays ten thousand dollars, in two equal instalments, the first in March next, and the other in March following, for which sum the said William Bisland made his two promissory notes, indorsed by John P. Watson, and payable at the office of the Louisiana Bank in New Orleans. The said R. G. Ellis \$6,966.66, on two notes indorsed by William Bisland. The said George S. Guion, \$2,750, on two notes indorsed by Van P. Winder. The said Van P. Winder, \$2,750, on two notes indorsed by George S. Guion. The said William B. Shields, \$4,766.66, on two notes indorsed by Mrs. Victoire Shields; and finally, Mrs. Victoire Shields the same amount on two notes payable as aforesaid at the office of the Louisiana Bank, in New Orleans."

The complainant was to release the purchaser, Thomas R. Shields, and his indorsers, from all their liabilities then outstanding, and was to dismiss the attachment suit then pending against Thomas R. Shields and Bisland.

The bill further alleges, that though the notes were given, and the complainant went into possession under the agreement of compromise, the agreement ought to be rescinded, and the complainant restored to his original rights under the contract of sale; and it alleges various reasons therefor, which it is not necessary in this connection to state. It concludes with a prayer that the act of compromise may be declared to have been improperly procured, and may be annulled and set aside, and that the defendants may be decreed to pay such of the notes, bearing their indorsement, as may fall due during the progress of the suit, and for general relief.

Such being the scope of this bill and its parties, it is perfectly clear that the circuit court of the United States for Louisiana, could not make any decree thereon. The contract of compromise was one entire subject, and from its nature could not be rescinded, so far as respected two of the parties to it, and allowed to stand as to the others. Thomas R. Shields, the principal, and four out of six of his indorsers, being citizens of Louisiana, could not be made defendants in this suit; yet each of them was an indispensable party to a bill for the rescission of the contract. Neither the act of congress of February 28, 1839, 5 Stats. at Large, 321, section 1, nor the 47th rule for the equity practice of the circuit courts of the United States, enables a circuit court to make a decree in equity, in

U.S. Circuit Court of Louisiana, no jurisdiction, the principal & four persons were citizens of Louisiana.

the absence of an indispensable party, whose rights must necessarily be affected by such decree.

In *Russell v. Clarke's Executors*, 7 Cranch, 98, this court said: "The incapacity imposed on the circuit court to proceed against any person residing within the United States, but not within the district for which the court may be holden, would certainly justify them in dispensing with parties merely formal. Perhaps in cases where the real merits of the cause may be determined without essentially affecting the interests of absent persons, it may be the duty of the court to decree, as between the parties before them. But, in this case, the assignees of Robert Murray and Co. are so essential to the merits of the question, and may be so much affected by the decree, that the court cannot proceed to a final decision of the cause till they are parties."

see parties to equity suits
The court here points out three classes of parties to a bill in equity. They are: (1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

A bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition, as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties.

Now it will be perceived, that in *Russell v. Clarke's Executors*.

this court, after considering the embarrassments which attend the exercise of the equity jurisdiction of the circuit courts of the United States, advanced as far as this: They declared that formal parties may be dispensed with when they cannot be reached; that persons having rights which must be affected by a decree, cannot be dispensed with; and they express a doubt concerning the other class of parties. This doubt is solved in favor of the jurisdiction in subsequent cases, but without infringing upon what was held in *Russell v. Clarke's Executors*, concerning the incapacity of the court to give relief, when that relief necessarily involves the rights of absent persons. As to formal or unnecessary parties, see *Wormley v. Wormley*, 8 Wheat., 451; *Carneal v. Banks*, 10 *ibid.*, 188; *Vattier v. Hinde*, 7 Pet., 266. As to parties having a substantial interest, but not so connected with the controversy that their joinder is indispensable, see *Cameron v. M'Roberts*, 3 Wheat., 591; *Osborn v. The Bank of the United States*, 9 *ibid.*, 738; *Harding v. Handy*, 11 *ibid.*, 132. As to parties having an interest which is inseparable from the interests of those before the court, and who are, therefore, indispensable parties, see *Cameron v. M'Roberts*, 3 *ibid.*, 591; *Mallow v. Hinde*, 12 *ibid.*, 197.

In *Cameron v. M'Roberts*, where the citizenship of the other defendants than Cameron did not appear on the record, this court certified: "If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone." And the grounds of this distinction are explained in *Mallow v. Hinde*, 12 Wheat., 196, 198.

Such was the state of the laws on this subject when the act of congress of February 28, 1839, 5 Stats. at Large, 321, was passed, and the 47th rule, for the equity practice of the circuit court of the United States, was made by this court.

The first section of that statute enacts: "That when, in any suit, at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or

decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit."

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This act relates solely to the non-joinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest, are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and, so far as it touches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of *Cameron v. M'Roberts*, 3 Wheat., 591; *Osborn v. The Bank of the United States*, 9 *ibid.*, 738; and *Harding v. Handy*, 11 *ibid.*, 132. For this court had already there decided, that the non-joinder of a party who could not be served with process, would not defeat the jurisdiction. The act says, it shall be lawful for the court to entertain jurisdiction; but, as is observed by this court, in *Mallow v. Hinde*, 12 Wheat., 198, when speaking of a case where an indispensable party was not before the court, "we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

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So that, while this act removed any difficulty as to jurisdiction, between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. And the 47th rule is only a declaration, for the government of practitioners and courts, of the effect of this act of congress, and of the previous decisions of the court, on the subject of that rule. *Hagan v. Walker*, 14 How., 36. It remains true, notwithstanding the act of congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court, in *Elmendorf v. Taylor*, 10 Wheat., 167: "If the case may be completely decided, as between the litigant parties,

the circumstance that an interest exists in some other person whom the process of the court cannot reach,—as if such party be a resident of another State,—ought not to prevent a decree upon its merits.” But if the case cannot be thus completely decided, the court should make no decree.

We have thought it proper to make these observations upon the effect of the act of congress and of the 47th rule of this court, because they seem to have been misunderstood, and misapplied in this case; it being clear that the circuit court could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affecting the rights of absent persons, and that the original bill ought to have been dismissed.*

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*See also Conolly v. Wells, 33 Fed. 295, for a further discussion of necessary defendants in equity.

CHAPTER III.

THE COMPLAINT.

Section 1. The Facts Constituting the Cause of Action.

CODE PROVISIONS.

"First pleading to be the complaint." "The first pleading, on the part of the plaintiff, is the complaint."—*N. Y. Code Civ. Proc. sec. 478.*

"Complaint: what to contain. The complaint must contain:

"1. The title of the action, specifying the name of the court in which it is brought; if it is brought in the supreme court, the name of the county, which the plaintiff designates as the place of trial; and the names of all the parties to the action, plaintiff and defendant.

"2. A plain and concise statement of the facts, constituting each cause of action, without unnecessary repetition.

"3. A demand of the judgment to which the plaintiff supposes himself entitled."—*N. Y. Code Civ. Proc. sec. 481.*

*"The petition is the first pleading—what it shall contain.—*The first pleading on the part of the plaintiff is the petition, which shall contain: First, the title of the cause, specifying the term, the name of the court and county in which the action is brought, and the names of the parties to the action, plaintiffs and defendants; second, a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; third, a demand of the relief to which the plaintiff may suppose himself entitled. If the recovery of money be demanded, the amount thereof shall be stated, or such facts as will enable the defendant and the court to ascertain the amount demanded."—*Mo. Code (R. S. 1899) sec. 592.*

(a) *Ultimate Facts as Distinguished From Matters of Law and Evidence.*

SHERIDAN v. JACKSON.

72 N. Y. 170. [1878.]

EARL, J. On the trial of this action, after plaintiff had opened his case, the court dismissed the complaint on the ground that it did not state facts sufficient to constitute a cause of action. He did not ask for leave to amend his complaint, but he excepted to the decision and appealed to the General Term, and then to this court, insisting all the time that his complaint was sufficient. Under such circumstances the complaint must be treated here as if it had been demurred to, and the sole question to be considered here is, whether it sufficiently states a cause of action?

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It alleges that plaintiff "was, on the 19th day of November, 1856, entitled to the possession of, and the rents, issues and profits thereof, and has been since and still is entitled to the same," of seventy-five lots of land in the city of Brooklyn, describing them; that on or about the 26th day of January, 1870, an action was begun in the Supreme Court between the defendants Jackson as plaintiffs and the other defendants, excepting Cameron, as defendants, and that the parties to that action claimed as between each other some interest in these premises or the rents, or profits thereof; that afterwards in that action defendant Cameron was appointed receiver of the rents, issues and profits of the said premises; that subsequently rents and profits amounting to a large sum arising from the said premises came into his hands, and that plaintiff had demanded from him the rents and profits so received by him, and had been refused; and then the plaintiff demanded relief, that the defendant Cameron account for all moneys received by him in the action in which he was appointed receiver; that he be restrained from "paying over to any person or persons, or making any disposition of the said moneys," so received, or afterwards to be received by him; "that he be required to pay the said moneys into court," or to the plaintiff, or to a receiver to be appointed in the action; that such order be made as is just; that a judgment and decree be made adjudging and requiring the said moneys to be paid to the plaintiff. No relief or judgment was

demand against any of the defendants but the receiver Cameron.

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The complaint does not allege any facts showing that the plaintiff was entitled to the rents and profits. It does not allege that he owned or ever possessed the premises, or that he owned the rents. The allegation that he was entitled to the possession of the land and to the rents and profits, is a mere allegation of a conclusion of law. The facts should have been alleged from which such a conclusion of law could have been drawn. (Pattison v. Adams, 7 Hill, 126; Seofield v. Whitelegge, 49 N. Y. 259.)

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There is a further defect. The complaint does not show any right in the plaintiff to intervene in the litigation between the defendants. There is no allegation that any of the parties to that action claimed anything therein in hostility to him, or showing that he could in any way be damaged by that litigation, or bound by anything done or adjudicated therein. What right had he then to come into court and seek to take or control the moneys which they, in a litigation between themselves, had placed in the hands of a receiver to be disposed of in that action?

There is, therefore, abundant reason for holding that the complaint did not state facts sufficient to constitute a cause of action. * * *

*Judgment affirmed.**

for def.

PAYNE v. TREADWELL.

16 Cal. 220. [1860.]

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On petition for rehearing, FIELD, C. J., delivered the opinion of the Court—BALDWIN, J., concurring.

The defendants apply for a rehearing upon three grounds, which were not noticed in the opinions delivered in this case: 1st. Error in overruling the demurrer to the complaint. * * *

The first ground was discussed in the briefs of counsel, and

*And so in Garner v. McCullough, 48 Mo. 318, "the averment that the plaintiff was entitled to exclusive possession of the premises is the statement of a mere conclusion of law, from facts which were traversable and which were not set out in the petition."

should have been considered in the opinion; for, if sustained, it must lead to a reversal of the judgment. We will now supply the omission and proceed to consider it at length.

The complaint alleges "that the said plaintiffs are the owners in fee as tenants in common, and have the lawful right and are entitled to the possession" of the described premises, and that the said defendants wrongfully entered upon and are now in the wrongful and unlawful possession of said premises, and wrongfully and unlawfully withhold the possession thereof from said plaintiffs. Then follows the prayer: "Wherefore, the plaintiffs demand judgment that they recover and be put in possession of said premises, and that the defendants pay damages for the unlawful withholding of said premises, and for the rents and profits thereof, in the sum of \$3,000."

To the complaint the defendants demurred, on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer, if we understand it, is also directed to the absence of any allegations as to the damages claimed in the prayer.

The principal objection to the complaint, and the only one urged in the brief of counsel, and in the petition for a rehearing, is that its allegations of title and right of possession in the plaintiffs, and of the wrongful and unlawful possession by the defendants, are not allegations of facts but of conclusions of law.

It is usual to speak of the action to recover the possession of real property as an action of ejectment, and it is possible that with the technical designation it is sometimes thought that some of the technical allegations peculiar to the old form of the action are still necessary. But such is not the case. There is but one form of civil actions in this State, and all the forms of pleadings and the rules by which their sufficiency is to be determined are prescribed by the Practice Act. (See sec. 37.) The complaint must contain "a statement of the facts constituting the cause of action in ordinary and concise language," and it may be verified by the oath of the party, in which case the answer must also be verified. The system in this State requires the facts to be alleged as they exist, and repudiates all fictions. And only such facts need be alleged as are required to be proved, except to negative a possible performance of the obligation which is the basis of the action, or to negative an inference from an act which is in itself indifferent. Now, what facts

Plaintiffs allege that they are the "owners" entitled

Technical allegations old action ejectment no longer necessary in this State.

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must be proved to recover in ejectment? These only: that the plaintiff is seized of the premises, or of some estate therein in fee, or for life, or for years, and that the defendant was in their possession at the commencement of the action. The seizin is the fact to be alleged. It is a pleadable and issuable fact, to be established by conveyances from a paramount source of title, or by evidence of prior possession. It is the ultimate fact upon which the claim to recover depends, and it is facts of this character which must be alleged, and not the prior or probative facts which go to establish them. It is the ultimate facts—which could not be struck out of a pleading without leaving it insufficient—and not the evidence of those facts, which must be stated. It is sufficient, therefore, in a complaint in ejectment for the plaintiff to aver in respect to his title, that he is seized of the premises, or of some estate therein in fee, or for life, or for years, according to the fact. The right to the possession follows as a conclusion of law from the seizin, and need not be alleged.

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The possession of the defendant is of course a pleadable and issuable fact, and the only question of difficulty arises from the supposed necessity of negating its possible rightful character. That negative allegations, which are not required to be proved, may in some actions be necessary, may be admitted; but is there any such necessity as to the possession of the defendant in an action of ejectment? It seems to us that the substance of a complaint in ejectment under our practice is this: "A owns certain real property, or some interest in it; the defendant has obtained possession of it, and withholds the possession from him." If the defendant's holding rests upon any existing right, he should be compelled to show it affirmatively, in defense. The right of possession accompanies the ownership, and from the allegation of the fact of ownership—which is the allegation of seizin in "ordinary language"—the right of present possession is presumed as a matter of law. We do not think, therefore, any allegation beyond that of possession by the defendant is necessary, except that he withholds the possession from the plaintiff. The allegation that the possession is "wrongful or unlawful" is not the statement of a fact, but of a conclusion of law. The words are mere surplusage, and though they do not vitiate, they do no good. The withholding of the possession from one who is seized of the premises, is presumptively adverse to his right, and wrongful. It is

by force of this presumption that the plaintiff can rest, in the first instance, his case at the trial upon proof of his seizin, and of the possession by the defendant. From these facts, when established, the law implies a right to the present possession in the plaintiff, and a holding adverse to that right in the defendant.

Where the plaintiff has been in possession of the premises for which he sues, it will be sufficient for him to allege in his complaint such possession, and the entry, ouster and continued withholding by the defendant. Such allegations are proper when they correspond with the facts, but they are not essential, as is thought by many members of the bar. In this state, the possession does not always accompany the legal title. The statute authorizes a sale and conveyance of land held adversely by third persons; and the legal title is frequently held by parties who never had the possession.

In the Courts of New York—and it is well known that the Practice Act was taken principally from the code of procedure of that State—there was at one time some conflict of opinion as to what were sufficient allegations in a complaint in ejectment under the code. It is now, however, settled by the Supreme Court of that State substantially in accordance with the views we have expressed. In *Ensign v. Sherman* (14 How. Prac. 439) the plaintiff averred in her complaint that she had lawful title as the owner in fee simple to the real estate in controversy, which was described; that the defendant was in possession of it, and unlawfully withheld possession thereof from her, and on demurrer the complaint was held sufficient. *Walter v. Lockwood* (23 Barb. 228) is to the same effect.

In *Sanders v. Leavy* (16 How. Prac. 308) the complaint was similar to the complaint in the cases cited, and was demurred to on the ground that it did not state facts sufficient to constitute a cause of action; because first, it did not allege that the plaintiff or his grantor was ever in possession; and second, it did not allege that such possession was disturbed, and they were evicted by the defendant, his grantors or predecessors. And it was contended on the argument, as in the case at bar, that the allegations as to the plaintiff's title and the defendant's possession were not averments of facts, but of conclusions of law; but the Court held the complaint sufficient, and gave judgment against the demurrer. "To recover real estate," said Mr. Justice Ingraham, in delivering the opinion, "what is it necessary

for the plaintiff to prove? Two things: first, that he is the owner of the property; secondly, that the defendant withholds from him the possession without right. Both facts are plainly averred in the complaint." The designation of the withholding of the possession by the defendant, in the cases cited, as unlawful, is not considered as constituting any valid ground of objection. In *Sanders v. Leavy* the attention of the Court was specially directed, in the argument of counsel, to this mode of characterizing the act. For the reasons we have already stated, we consider it unnecessary to give it any character by special designation; for, being against one who is seized of the premises, it is presumptively adverse and wrongful. To allege that it is unlawful, is merely to state that which follows under the circumstances as a conclusion of law from the act itself.

The decisions of this court in respect to the necessary allegations of a complaint in ejectment, have not been uniform, and, perhaps, on no one subject of pleading is there so much embarrassment felt by the profession in consequence. In *Gladwin et al. v. Stebbins* (reported as *Goodwin et al. v. Stebbins*, in 2 Cal., 105) the complaint averred that the plaintiffs were "lawfully entitled to the possession of the premises," and the Court held, Mr. Justice Heydenfeldt delivering the opinion, that the allegation was of a material fact and therefore sufficient. In this respect we think the opinion cannot be sustained. The averment is clearly a mere statement of a conclusion of law. In *Payne et al. v. Treadwell* (5 Cal., 310) the complaint alleged, that the plaintiffs had "lawful title as owners in fee simple of the premises," and "that the defendant is in possession and unlawfully withholds the same;" and on demurrer the Court held the complaint insufficient. "Notwithstanding," said Chief Justice Murray, in delivering the opinion, "our statute has dispensed with the old form of pleading, and it is no longer necessary to allege a fictitious demise, etc., still, I apprehend that facts sufficient must be pleaded to show plaintiff's right to recover, and it will not do to state conclusions of law in place thereof. The allegation, that the defendant is in possession, and unlawfully withholds the premises, is insufficient; it is a conclusion of law drawn from the character of defendant's possession, the circumstances of which should be stated."

The decision, as is apparent, does not relate to the allegation as to the plaintiff's title, notwithstanding the general observations of the Chief Justice; it applies only to the allegation as

to the withholding of the possession by the defendant. So far as this was alleged to have been unlawful, the allegation was of a conclusion of law. But the giving of a certain character to the withholding, as unlawful, did not change the material fact, that the possession was withheld; and this, as we have seen, taken in connection with the previous allegations of title in the plaintiff, and possession by the defendant, was sufficient. A more particular statement of "the circumstances" of the defendant's possession or withholding, is not necessary under our system of practice. The decision, in this respect, has tended to produce inconvenience to practitioners, and prolixity in pleading, and we have no hesitation in overruling it.

In Gregory v. Haynes et al. (October term, 1859, No. 2,148) it was held, that the findings by the Court below—that one of the defendants and not the plaintiff was the owner, and entitled to the possession of the property in controversy, and that the defendants did not unlawfully detain the same from the plaintiff—would not support the judgment, and the decision was based upon the ground, that the ownership and right of possession were not facts, in the legal sense of that term, but conclusions of law. We have had great doubt of the correctness of this decision, ever since it was rendered, and upon the examination which we have given to the subject, in considering the case at bar, we are satisfied that we erred, and are glad we have an opportunity, at so early a day, of correcting our error. The fact was found, that one of the defendants was the owner of the premises in controversy, and that fact alone was sufficient to support the judgment against the plaintiff, nothing else having been found to qualify the right to the possession which accompanies the title. The balance of the findings might have been treated as surplusage. The claim of the plaintiff having been thus disposed of, it was unnecessary to find as to the character of the defendant's detention of the premises.

In Boles v. Johnston et al. (January term, 1860) the opinion states that the substantial averments of the complaint were only that the plaintiffs were the owners of the property in question, and that the defendant was in possession of it. It does not state that there was any averment that the possession was withheld from the plaintiff. If such averment were in fact made in the complaint, the decision cannot be sustained.

It follows, from the views we have expressed, that the complaint in the case at bar is sufficient. It avers that the plaintiffs

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plaint is case was are the owners in fee, as tenants in common, of the premises; that the defendants are in possession of the same, and withhold the possession thereof from the plaintiffs. Whatever is alleged beyond these averments is immaterial, and may be stricken out. The facts essential to a good complaint are stated, and the additional allegation of lawful right and title in the plaintiff, and the designation of "wrongful" and "unlawful" applied to the possession and withholding of the defendant, though unnecessary, do not vitiate the pleading; and the demurrer was properly overruled.*

_____ for plain.

SMITH v. DEAN.

19 Mo., 63. [1853.]

GAMBLE, Judge, delivered the opinion of the court:

ins, and legal users" of bond, as trustees of the principal obligee. The plaintiffs claim to recover on a bond made by the defendant, Dean, payable to one Crupper. They allege that they are the legal holders of the bond, as trustees of Crupper, for the benefit of his creditors. The bond was payable on the 2d of September, 1840. There is no allegation that the bond was assigned to the plaintiffs. The petition was demurred to and the demurrer was sustained. Two questions are presented on the demurrer. 1. Whether the title of the plaintiffs to the bond is sufficiently stated in the petition. 2. Whether the petition does not show that the action on the bond is barred by the statute of limitations.

plaint is sufficient cause its is really at plain. legal holder which conclusion law. 1. We will not say how far the act requiring the assignment of bonds and notes to be by indorsement thereon, in order to enable the assignee to sue in his own name, is affected by the code of practice, which abolishes the distinction between law and equity, and requires all suits to be commenced and prosecuted in the name of the real party in interest. But if an assignee, or the person beneficially interested in a bond may sue thereon, without stating an indorsement, he must still state his title in his petition. To state that he is the legal holder, is to state a conclusion of law from facts that are traversable. He must state facts that give him the title to the bond, when, upon its

*See also Grewell v. Walden, 23 Cal. 165. (Ownership of personal property.)

own face, the title appears to be in another.) The obligation of the defendant was, to pay money to Crupper. By what facts did he become bound to pay it to the plaintiffs? The petition fails to state the facts. The petition says the plaintiffs are the legal holders, as trustees for Crupper, for the benefit of his creditors. This is no statement of any act done by Crupper transferring the bond. The plaintiffs may be constituted such trustees by the act of Crupper, or if the transaction occurred in another state, they may be trustees of an insolvent debtor, appointed by law. The petition is, in this respect, defective.

* * *

The judgment is, with the concurrence of the other judges, affirmed.

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McCAUGHEY v. SCHUETTE.

117 Cal., 223. [1896.]

SEARLS, C. This is an action to recover possession from the defendants, who are appellants here, of lots A, B, C, J, K, and L in block 131 of Horton's addition to San Diego, county of San Diego, state of California. Plaintiff had judgment, from which judgment, and from an order denying their motion for a new trial, defendants appeal.

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The complaint was demurred to upon the ground, among others, that it does not state facts sufficient to constitute a cause of action. We think the demurrer should have been sustained. The complaint may be summarized thus: (1) December 22, 1891, defendants made their promissory note to plaintiff for \$2,000, and to secure the payment thereof executed a mortgage upon the lots of land sought to be recovered in this action. (2) Afterwards, and on the 22d day of March, 1893, plaintiff and defendants entered into an agreement by the terms of which said defendants agreed to convey to plaintiff, and the latter agreed to take, said real property in full payment of the note, and to release defendants from liability thereon, and deliver the same up to defendants, and to discharge of record the mortgage. (3) That on the 23d day of December, 1893, defendants delivered to plaintiff their grant deed of said premises, and the latter delivered up the note and discharged the mortgage of record. Said deed from defendants to plaintiff and the note

Deed is not evidence of ownership,
but here the court treated it as such,

and mortgage are made part of the complaint. (4) At the date of the delivery of the deed there was \$2,501.28 due on the note, and the deed was made in payment thereof. (5) Defendants are in possession of the premises, and plaintiff has demanded possession thereof, which said defendants refused to deliver up, and exclude plaintiff therefrom against his will and right. Wherefore he demands judgment for the delivery of possession of said premises, etc. It is a fundamental rule of our code pleading that ultimate, and not probative, facts are to be averred in a pleading. *Miles v. McDermott*, 31 Cal., 271. In *Thomas v. Desmond*, 63 Cal., 426, it was said, in substance, that, where a complaint merely states the evidence from which ultimate facts are deducible, a demurrer lies. In *Siter v. Jewett*, 33 Cal., 92, it was held that averments in a complaint of the facts constituting a deraignment of title are but averments of evidence, and are not admitted by a failure to deny them in the answer. *Recoullat v. Rene*, 32 Cal., 450, is to like effect. In *Gates v. Salmon*, 46 Cal., 361, it was held that an allegation in a complaint that B. executed an instrument in writing, purporting to convey to T. a tract of land, which is recorded (stating where), is a mere allegation of evidence, and may be disregarded as surplusage. Such evidentiary matters should be stricken out in an action of ejectment. *Wilson v. Cleaveland*, 30 Cal., 192. See, also, *San Joaquin Co. v. Budd*, 96 Cal., 47 (30 Pac. 967). It will be observed that in the complaint in the present case there is no averment of seisin, or ownership, or possession, or right of possession to the demanded premises, but the pleader contents himself with a statement of evidentiary facts, which, if proven at the trial, would authorize the court in finding the ultimate fact of ownership and right to possession in the plaintiff. In *Frederick v. Tracy*, 98 Cal., 658 (33 Pac. 750), it was said of such a pleading that it was insufficient, and that a complaint which stated only facts from which the ultimate fact might be deduced was subject to a demurrer. In *City of Los Angeles v. Signoret*, 50 Cal., 298, the action was to enforce a lien for the construction of a sewer. The complaint referred to an exhibit, attached to and made a part thereof, for particulars, which exhibit recited the various steps necessary to create the lien, but on demurrer the pleading was held insufficient. The complaint here is argumentative; that is to say, the affirmative existence of the ultimate fact is left to inference or argument. Such pleading was bad at com-

mon law, and is none the less so under our code system. To uphold such a pleading is to encourage prolixity, and a wide departure from that definiteness, certainty, and perspicuity which it was one of the paramount objects sought to be enforced by the code system of pleading, and that, too, with no resultant effect, except to incumber the record with verbiage, and enhance the cost of litigation. We recommend that the judgment and order appealed from be reversed, and that the court below be directed to sustain the demurrer to plaintiff's complaint, and that he have leave to amend. *It is also prolix.*

I concur? BRITT, C.

Per Curiam. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to sustain the demurrer to plaintiff's complaint, and that he have leave to amend. *for def.*

CLARK v. C., M. & ST. P. R. R. CO.

28 Minn., 69. [1881.]

MITCHELL, J. This is an appeal from an order sustaining a demurrer to the complaint. The ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action. The here material allegations of the complaint are as follows: "That on the 6th of September, 1880, the servant of the plaintiff was lawfully travelling in a wagon drawn by two horses, all the property of the plaintiff, along the public highway in the town of Carlston, in the county of Freeborn, which public highway crosses the railroad operated by said defendants near the section line between sections 29 and 32 in said township; that as said servant of this plaintiff reached said crossing the defendants herein, by the culpable carelessness, negligence, unskillfulness and mismanagement of said defendants and their employees, wrongfully run a locomotive, with a train of cars thereto attached, used and employed by defendants in operating said road, against plaintiff's said horses, and threw them down, killing one of them immediately, and so severely injuring the other as to render him practically worthless."

action for damages caused by train striking a wagon which plaintiff was riding

It is urged that it is not sufficient to allege that an act was done negligently or carelessly; that this is merely a conclusion

of law, and not a statement of an issuable fact; that the physical facts constituting the negligence must be alleged. It is, of course, an elementary rule of pleading that facts, and not mere conclusions of law, are to be pleaded. But this rule does not limit the pleader to the statement of pure matters of fact unmixed with any matter of law. When a pleader alleges title to or ownership of property, or the execution of a deed in the usual form, these are not statements of pure facts. They are all conclusions from certain probative or evidential facts not stated. They are in part conclusions of law and in part statements of facts, or rather the ultimate facts drawn from these probative or evidential facts not stated; yet, these forms are universally held to be good pleading. Some latitude therefore must be given to term "facts" when used in a rule of pleading. It must of necessity include many allegations which are mixed conclusions of law and statements of facts, otherwise pleadings would become intolerably prolix, and mere statements of the evidence. Hence, it has become a rule of pleading that while it is not allowable to allege a mere conclusion of law containing no element of fact, yet it is proper, not only to plead the ultimate fact inferable from certain other facts, but also to plead anything which, according to the common and ordinary use of language, amounts to a mixed statement of facts, and of a legal conclusion. It may not be possible to formulate a definition that will always describe what is a mere conclusion of law, so as to distinguish it from a pleadable, ultimate fact, or that will define how great an infusion of conclusions of law will be allowed to enter into the composition of a pleadable fact. Precedent and analogy are our only guides. And it is undoubtedly true that there will be found a want of entire judicial harmony in the adjudicated cases as to what are statements of fact and what are mere conclusions of law. And in holding one class of inferences as facts to be pleaded, and another as conclusions of law to be avoided, courts may have been often governed more by precedent than by a substantial difference in principle. But it has been quite generally held that the question of negligence in a particular case is one of mingled law and fact; that when we speak of an act as negligent or careless, according to the common use of language, we state, not simply a conclusion of law, but likewise state an ultimate fact inferable from certain other facts not stated.

Therefore, it has been generally settled by precedent and

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authority that a general allegation of negligence or carelessness, as applied to the act of a party, is not a mere conclusion of law, but is a statement of an ultimate fact allowed to be pleaded.

Such a general form of alleging negligence, seems to have been permissible in common law pleading. Some of the forms of declarations given by Chitty, when stripped of mere superfluous verbiage, amount to nothing more than this. See 2 Chitty on Pleading, 650; also Bliss on Code Pleading, § 211; Grinde v. C., M. & St. P. R. R. Co., 42 Iowa, 377; Oldfield v. N. Y. & H. R. R. Co., 14 N. Y., 310.

Therefore, while the court on motion would, on proper showing, doubtless have the right to require this complaint to be made more definite, yet we think it was not demurrable on the grounds stated.

Another objection made to this complaint is that from the facts stated it appears that plaintiff himself was guilty of contributory negligence. It is the settled law of this state that contributory negligence of the plaintiff is matter of defence, and that plaintiff, in making out his case, need not prove the absence of it. Wilson v. N. P. R. R. Co., 26 Minn., 298.

Hence it is not necessary for the plaintiff in his complaint to negative the existence of a contributory negligence on his part. It is, however, doubtless true that if his complaint stated facts which showed affirmatively that he was guilty of negligence which contributed to the injury, the complaint would be demurrable. But this complaint is not liable to any such objection; it alleges that his team was lawfully travelling along the highway at the time and place when and where the accident occurred. It did not allege that his servant did not look out for approaching trains, nor does it appear from the facts stated that he could have seen it if he had looked, so as to raise a presumption that he failed to look. The remark made by this court in Brown v. Railroad Co., 22 Minn., 168, quoted by counsel, was made with reference to the facts and circumstances of that case as indisputably disclosed by the evidence.

Ordered reversed.

for plain.

Negligence is a conclusion drawn from an infinite number of facts; fraud is a conclusion drawn from a definite no. of facts. In fraud, we have a definite standard to which the facts settled.

OMAHA & R. V. RY. CO. v. WRIGHT.

47 Neb., 886. [1896.]

IRVINE, C. The defendants in error brought this action against the railway company to recover damages on account of cattle belonging to them, killed and injured by a train of the railway company. The petition, while it is in one count, really alleges or attempts to allege three grounds of recovery: First, that a gate on one of the fences along the right of way was insufficient, and negligently permitted to be out of repair, and that, by reason of those facts, the cattle got upon the right of way; second, that after they got upon the right of way, their injury resulted from the careless operation of the train; third, that the railway company, after the stock was injured, took possession of the dead bodies and the injured cattle, and refused to permit the owner to retake them,—that is, a charge of conversion. The answer of the railway company was a series of denials,—some of them negatives pregnant, but the whole effect practically that of a general denial,—coupled with some affirmative allegations in regard to the security of the gate and negligence on the part of the plaintiffs. From a verdict and judgment in favor of the plaintiffs for \$569, the defendant prosecutes error. * * *

It is quite clear, under the instructions of the court, that the verdict turned upon the negligence of the railway company in operating its train, whereby the cattle were killed and injured after they came upon the right of way. On this branch of the case, the allegations of the petition are that the defendant, “by its agents and employees, while running at a high rate of speed, carelessly and negligently, and without using due caution, ran the engine and train of cars connected therewith and attached thereto over and upon the cattle of these plaintiffs; * * * that the said defendant carelessly and negligently, by its employees and servants, in operating said train, ran their said engine and train in, over, and upon said plaintiffs’ stock, when, by exercising proper care and skill in the management and handling of its engine and train, it could have stopped said train long before striking said plaintiffs’ stock.” An allegation of negligence or want of care is like an allegation of fraud. It is a bare conclusion. A pleading is not sufficient which merely in general terms charges a want of due care or negli-

gence. It is necessary to plead the facts from which an inference of negligence arises. Railroad Co. v. Grablin, 38 Neb., 90 (56 N. W., 796), and (57 N. W., 522); Malm v. Thelin, 47 Neb., 686, 66 N. W., 650. The petition merely alleges that the defendant negligently ran over the stock, while by the use of proper care it might have stopped the train before striking the cattle.*

Judgment reversed.

for def.

L. & N. R. R. CO. v. WOLFE.

80 Ky., 82. [1882.]

Judge HARGIS delivered the opinion of the court.

It is alleged in substance by the appellee that there was a hole in the platform connected with the appellant's depot; that the opening, and its dangerous character, were known to the appellant, but it negligently, wantonly, and willfully, failed and refused to repair it, and while removing a box of freight from said depot to his wagon, having necessarily to pass over said hole, he fell into it, and broke the left patella or knee cap of his leg, for which he prayed damages.

From a judgment, upon a verdict of \$2,000 in favor of appellee, the appellant prosecutes this appeal, and raises the question, first, upon the pleadings, that the facts constituting contributory negligence, which it pleaded, were not denied, and therefore no verdict or judgment should have been rendered in appellee's behalf.

The allegation of the answer is, "that the plaintiff had full knowledge of such defect, and with his eyes wide open, and in open broad daylight, walked into said hole, and by his own negligence contributed to said injury, and thereby he alone is responsible for his misfortune."

To this the appellee replied, that "the plaintiff, Wm. R. Wolfe, for reply to defendant's answer, denies that he was guilty of any negligence at or before the time of the injury complained of in this petition, or that he contributed in any way by his negligence to the occurrence of said injury. He denies that defendant is relieved from responsibility for their

*But see C., R. I. & P. Ry. v. O'Donnell, 101 N. W. 1009.

gross and willful neglect by reason of any negligence on the part of the plaintiff."

It is contended by counsel that the reply fails to deny the substantive facts constituting contributory negligence, and only traverses the averment of negligence, which is but denying a legal conclusion.

The error in this position lies in the assumption that the allegation of negligence is a mere legal conclusion, and that the supposed substantive facts constitute contributory negligence, neither of which is true.

Negligence is the ultimate fact to be pleaded, and it forms part of the act from which the injury arises, or by which contributory negligence is made out. It is the absence of care in the performance of an act, and is not merely the result of such absence, but the absence itself, and it is not, therefore, a mere conclusion of law, and may be pleaded generally. Although the apellee, with his eyes open and in broad daylight, walked into the "hole," these facts alone would not constitute neglect, but if done intentionally or negligently they would do so. Nor does the fact that the apellee knew the "hole" was in the "floor," when added to those named, constitute negligence, as want or absence of care must be averred in some form, as it is one of the essential facts necessary to such a defense.

The issue formed by the reply was material. (42 Iowa, 378; 34 Mo., 235; 14 N. Y., 310; Bliss on Code Pleading, sec. 211.)

* * *

The judgment is affirmed.

for plain.

CEDERSON v. OREGON R. & NAV. CO.

38 Ore., 343. [1900.]

good case

This is an action for the recovery of damages for the killing of one William Cederson through the alleged negligent acts of the defendant company in operating its railroad. The complaint states, among other things, "that on the 4th day of November, 1896, and for a long time prior thereto, the defendant was engaged in the operation of a railway from Portland, Oregon, to Huntington, in the same state; that said road runs through certain property belonging to the Seufert Bros. Com-

pany, a few miles above Dalles city, in said state; that on the said 4th day of November, 1896, the said deceased was in the employ of said Seufert Bros. Company, and that on said day, while passing over the premises of said Seufert Bros. Company, from the eating house of said company, where he took his meals, to the place where he slept, and while rightfully and lawfully going across the premises of said Seufert Bros. Company, from one place to another, as he had a right to do, the said defendant was running one of its trains along its said road in close proximity to where the said plaintiff's decedent was walking; that in running and operating said train along said road the said defendant and its employees negligently and carelessly operated over said road a truck and car which were too wide for said track, and the wheels of which car, and the flanges thereon, were cracked, broken and unsafe, and so negligently and carelessly operated said train, and the engine and cars attached thereto, that by reason of said negligent and careless operation, and by reason of said truck and car being too wide and out of gauge with said track, and by reason of the bad, broken, and cracked condition of the wheels of said car, and by reason of all of said things combined, said car, and other cars attached to the same, jumped the track, while passing along said road, at a point opposite, or nearly opposite, where plaintiff's decedent was walking, as hereinbefore alleged, and ran and was thrown upon plaintiff's said decedent, causing him great bodily injury and death."

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The defendant moved the court to require the plaintiff to make the following clause of the complaint, namely ("and so negligently and carelessly operated said train, and the engine and cars attached thereto, that by reason of said negligent and careless operation"), more definite and certain, by stating the acts and things constituting the negligent and careless operation of the said train or engine or cars attached thereto. * * * The motion was overruled, and constitutes one of the assignments of error.

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WOLVERTON, J. * * *

Three other questions are presented, which arise under the pleading. These are brought upon the record by the motion to make the complaint more definite and certain, and by objections to the introduction of testimony at the trial. It may be premised that, where the sufficiency of the complaint is drawn in question, upon the admission of evidence, all intendments come

to its support, whereas, if tested by a demurrer, it must be construed most strongly against the pleader. It is first urged that the complaint is fatally defective, in that it fails to state the particular acts and omissions constituting the negligence which conduced to the injury complained of. The general, and we have no doubt the prevailing, rule upon the subject is that "a declaration specifying the act the commission or omission of which caused the injury, and averring generally that it was negligently and carelessly done or omitted, will suffice." The language quoted is from 14 Enc. Pl. & Pr. p. 334, and the proposition is abundantly supported by the authorities. "Negligence" is treated as a qualifying term, indicating the manner in which an act is done, and not as a mere conclusion of law. Maxw. Code, Pl. 251. It has been quite generally held that the question of negligence in a particular case is one of mingled law and fact, and that, in denoting or styling an act as careless or negligent, we signify, according to common understanding, not simply a conclusion of law, but state as well an ultimate fact, inferable from certain other facts not stated. "Therefore," says Mr. Justice Mitchell in *Clark v. Railway Co.*, 28 Minn., 69, (9 N. W. 75), "it has been generally settled by precedent and authority that a general allegation of negligence or carelessness, as applied to the act of a party, is not a mere conclusion of law, but is a statement of an ultimate fact allowed to be pleaded." The statement is of an issuable substantive fact, by reason of the qualifying sense in which the term is applied. It is not sufficient to plead merely that the plaintiff was injured by the negligence of the defendant, as the term would be applied to no one act of either commission or omission; nor is it good pleading to say that the defendant did an act whereby the plaintiff was injured, as it may have been accidental, or under circumstances which would not render him accountable. But when the terms "negligence" or "carelessness" are applied to the act which conduces to the injury, then the act is so qualified that it becomes actionable, and forms a basis for damages. The distinction is well illustrated in two cases from Indiana. In *Railroad Co. v. Dunlap*, 29 Ind., 426, the averment was that the injury was done "by and on account of the gross negligence of said plaintiff," and it was held to be bad pleading. But in *Railroad Co. v. Selby*, 47 Ind., 471, an allegation that "the track of said railway was in bad condition and repair, and the defendant, by its servants and employees,

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negligently, unskillfully, and carelessly conducted and ran said train," whereby injury resulted, was held to be good, the court saying: "The negligence complained of in the present case related to the condition of the track and the manner in which the train was run and managed. But in the case in 29 Ind., 426, no act was stated to which the negligence averred to exist could be applied. When the act complained of is sufficiently stated, it is sufficient to aver that the act was negligently done, without setting out in detail the particulars of the negligence." When used to qualify the act or omission complained of, the question is whether or not the act is such a one as is alleged, and thus described, and upon this hinges the result. "It is always necessary," says Mr. Justice Cooley, in *Lucas v. Wattles*, 49 Mich., 380 (13 N. W. 782), "that the plaintiff should count on the negligence he relies upon; but, when he properly avers the negligence, it is not essential that he should set out the facts which go to establish it. Neither is it usual to do so, nor would it commonly be prudent." In further support of the proposition, see *Clark v. Railway Co.*, supra; *Johnson v. Railway Co.*, 31 Minn., 283 (17 N. W. 622); *Rolseth v. Smith*, 38 Minn., 14 (35 N. W. 565); *Railway Co. v. Jennings*, 157 Ill., 274 (41 N. E. 629); *Fitts v. Waldeck*, 51 Wis., 567 (8 N. W. 363); *Young v. Lynch*, 66 Wis., 514 (29 N. W. 224); *Railroad Co. v. Wolfe*, 80 Ky., 82; *Schneider v. Railway Co.*, 75 Mo., 295; *Maek v. Railway Co.*, 77 Mo., 232; *Grinde v. Railway Co.*, 42 Ia., 376.

It is most stoutly contended, however, that this court has decided otherwise; that is to say that the specific facts constituting the negligence should be stated. At first blush, one would say there is ground for the contention, but a careful scrutiny of the cases does not bear it out. It is said in *Woodward v. Navigating Co.*, 18 Or., 289 (22 Pac. 1076):—"It is true, in some jurisdictions it seems to be held sufficient to allege generally that the injury complained of was carelessly and negligently inflicted upon the plaintiff, or that, by reason of the carelessness and negligence of the defendant, the plaintiff was injured; but this mode of statement has never been sanctioned or approved in this state, is at variance with the plain requirements of the code, and would give the defendant no notice of the acts claimed to be negligent, so that he might come prepared to meet them." And in *McPherson v. Bridge Co.*, 20 Or., 486 (26 Pac. 560), "The plaintiff's counsel claims, in effect, on the argument in this court, that a general allegation of negli-

gence and carelessness was sufficient. But that contention cannot be sustained. Such allegation does not charge a fact." *Knathla v. Railway Co.*, 21 Or., 136 (27 Pac., 91), is also cited to the same purpose. It is quite probable that the language quoted was used with reference to the general statement of negligence, without stating an act or omission, with the qualification that it was negligently or carelessly done, which all will admit is insufficient. This is obvious from the *McPherson Case*, wherein it was alleged "that while he (plaintiff) was so engaged in the erection of said tank through the negligence and carelessness of said defendants, and through the use of defective machinery by the defendant, * * * the said timbers employed in the erection of said tank fell upon the plaintiff." After making the remark above attributed to it, and citing the *Woodward Case*, the court further observed, "This leaves nothing upon which a recovery could be predicated but the charge of defective machinery;" thus indicating that the prior remarks of the court were directed to the general charge of negligence. However this may be, the question was not involved in either case, and the only one considered in that relation was whether there had been a variance between the proof and the pleadings. Nor does the *Knahtla* case support the proposition. The question there was whether the proof was in support of the allegation in the complaint, and the one under consideration here was not involved. But the view of Mr. Justice Bean, who wrote the opinion, appears to be in harmony with the view elsewhere entertained. He says: "Certainty to a common intent is all that is required, and this is attained in actions for damages resulting from negligence when the neglect of duty relied on and the resultant injury are described with substantial accuracy." *Wild v. Railway Co.*, 21 Or., 159 (27 Pac., 954), decided within a month of the *Knahtla* case, holds to the same view. The allegation there was, "that while the plaintiff was working upon or about said car, as hereinbefore alleged, the defendant failed to provide, preserve, and procure a safe place for him to work, and negligently and carelessly caused and permitted a locomotive and cars then upon its tracks to run up against the car upon which the plaintiff was working," etc.; and it was held that the gravamen of the complaint was in carelessly and negligently causing and permitting a locomotive and cars to run upon and against the car occupied by the plaintiff, whereby he was injured, which allegation was de-

terminated to be amply sufficient to support the action. No different view of the law has since been entertained by this court, and the Woodward and McPherson cases have never been treated as holding to the doctrine now attributed to them. See *Lieuallan v. Mosgrove*, 33 Or., 282 (54 Pac., 200, 664), and *Jones v. City of Portland*, 35 Or., 512 (58 Pac., 657). * * *

Judgment affirmed.

for plain

X KING v. OREGON SHORT LINE R. R. CO.

6 Idaho, 306. [1898.]

This action was brought by the respondent to recover the value of four head of cattle alleged to have been killed by appellant's locomotives and cars,—one alleged to have been killed on May 7, 1897; one on May 10, 1897; one on August 5, 1897; and one on November 5, 1897. The killing of each animal is set up as a separate cause of action. The third paragraph of each cause of action, which contains the allegations of the careless and negligent killing of said stock, is couched substantially in the same language, and in the first is as follows: "That the defendant, by its agents and servants, not regarding its duty in that respect, so carelessly and negligently ran and managed its locomotives and cars that the same ran against, upon, and over said steer, and killed and destroyed the same, to the damage of the plaintiff in the sum of \$18, no part of which has been paid." The total value of the four head is alleged to have been \$78. To each of said causes of action the defendant, who is appellant here, interposed a demurrer, on the ground of uncertainty, and distinctly specifies that each of said causes of action is uncertain in several particulars, and among them the following: (1) It does not state any facts constituting negligence or carelessness on the part of any agent or servant of the defendant, or of the defendant; (2) it does not state any act or omission on the part of any agent or servant of the defendant, or of the defendant, or of any one, constituting negligence or carelessness. The demurrer was overruled, and appellant declined to answer or further plead, whereupon judgment was given and entered in favor of the plaintiff. This appeal is from the judgment.

For general statement

This case does not represent the view of author in case involving stock - King, so

SULLIVAN, C. J. (after stating the facts.) There is but one question presented by the record, and that is: In actions based

distinguish between cases that come up on motion to make more definite, admitting a cause of action; and the cases on general demurrer admitting

on negligence, is it sufficient to plead negligence generally, or must the specific acts of commission or omission be specifically set out in the complaint? It is conceded by counsel for appellant that the complaint in this action would be good as against a general demurrer, towit, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, and that it is sufficient to sustain a verdict or judgment, unless attacked by a demurrer on the ground of uncertainty, specifically setting forth wherein it is uncertain. While counsel for the respondent concede that, if the facts are sufficiently within the knowledge of the pleader, it would be better pleading to plead them, they also contend that the rule of pleading negligence is so thoroughly settled in this country that it is no longer an open question, and the rule is to the effect that it is unnecessary to plead the particular acts or omissions that constitute the negligence, and cite Bliss, Code Pl. (3d Ed.) § 211a; Cunningham v. R. R. Co. (Cal.) 47 Pac., 452; Stephenson v. Southern Pac. Co. (Cal.) 34 Pac., 618; and numerous other cases. It is said in Bliss, Code Pl. (3d Ed.) § 211a, that a general allegation of negligence is allowed; that negligence is the ultimate fact to be pleaded, and is not a conclusion. Referring to negligence and fraud, it is said: "The law draws the conclusion in both cases, yet we can see that the negligence possesses more of the element of fact than does fraud.

* * * We do not infer it as a legal conclusion from certain facts, but it is a fact itself inferable from certain evidence.

* * * Fraud will never be presumed. The facts from which it is inferred must be shown." And, after giving some examples and citing authorities, the author concludes said section as follows: "Some negligence is presumed, and it must, of necessity, be alleged generally." Simply because "some negligence will be presumed," certain facts being shown, we are unable to comprehend that for that reason "negligence must, of necessity, be alleged generally." If certain facts must be shown before negligence will be presumed, the plaintiff must know these facts before he can show them; and if he knows them, he certainly can allege them, and thus inform the defendant of the specific facts from which the conclusion of negligence is drawn. If, under the laws of this state, the killing of a steer by a locomotive, engine or train of cars were made prima facie evidence of negligence, then, such killing being alleged in the complaint, a cause of action would be stated. But, under the statutes of

In case of passenger suing for injuries caused by R. R., it has always been permissible to allege carelessness, since

this state, something more than the killing must be shown, in order to entitle the plaintiff to recover. He must not only show the killing, but he must show the certain other fact or facts from which the conclusion of negligence will be inferred or drawn. And, if a plaintiff must show acts or omissions from which negligence will be inferred before he can recover, it certainly is no hardship on him, nor unreasonable, to require him to allege them. Subdivision 2, § 4168, Rev. Sts., provides that the complaint must contain "a statement of the facts constituting the cause of action in ordinary and concise language." The causes of action in this case are based on the negligent killing of certain animals. Under said provision of the statute, the complaint must contain a statement of the facts constituting the negligent killing, in "ordinary and concise language." In *Stephenson v. Southern Pacific Railroad Company*, supra, the facts constituting the negligence were stated in the complaint in ordinary and concise language. The court, after stating that at common law it was necessary, in a declaration for negligence, to set out the facts, in detail, constituting the basis of the action, says: "In adopting what is known as 'the code system of pleading,' courts in most of the states have excepted from the general rule, requiring a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded upon negligence, or, rather, they have so far modified the rule as to permit the plaintiff to state the negligence in general terms, without stating the facts constituting the negligence." If it be true that the courts of most of the states have excepted from the general rule, which requires a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded on negligence, or, rather, have so far modified that provision of the statute as to permit the plaintiff to state negligence in general terms, without stating the facts constituting the negligence, this court is not inclined to follow them. No doubt, we have much good court made law; but when we have a plain provision of the statute,—too plain for construction,—if it requires modification, the legislative department of the state may do that. This court will not undertake it. The legislature has furnished the basis of decision as to the facts a complaint must contain, and courts are bound by it. In the case last cited the court further said: "The statement of other facts auxiliary to this main fact (negligence) might have tended to a clearer conception of the prin-

has been applied in most instances to stock-killing cases, where stock is killed without plain being present, the court has peculiar know-

cial act, but the most that can be said against the pleading is that it states a cause of action, but states it imperfectly, which is the equivalent of saying that it is good except against a special demurrer." So we think in the case at bar the complaint sufficiently states a cause of action, except as against a special demurrer on the ground of uncertainty. The demurrer should have been sustained, and the plaintiff permitted to amend his complaint by setting forth the facts constituting the negligence. In *Woodward v. Navigation Co.* (Or.), 22 Pac., 1076, which was a case founded on negligence, the court says, "Our code (section 66) requires the complaint to contain a plain and concise statement of the facts constituting the plaintiff's cause of action, and one of the great objects to be attained by this enactment was to compel the plaintiff to place upon the record the specific and particular facts which he claims entitles him to recover," and holds that the plaintiff must allege in the complaint the acts or omissions of the defendant causing the injury, and show that they occurred through or by the negligence of the defendant. That decision recognizes the fact that in some jurisdictions it is sufficient to allege generally that the injury complained of was negligently done, but declares that that method of pleading has not been approved in that state. In *McPherson v. Bridge Co.*, 26 Pac., 560, the supreme court of Oregon holds that in actions for negligence a general allegation of negligence does not charge a fact. In *Batterson v. Railway Co.*, 13 N. W. 508 (a case from Michigan), the court held that the plaintiff, in negligence cases, is "bound to set out the combination of material facts relied upon as his cause of action, and follow up his allegations by evidence pointing out and proving the same combination of circumstances." See, also, *Car Co. v. Martin* (Ga.), 18 S. E. 364; *Steffe v. Railroad Co.* (Mass.), 30 N. E. 1137; *Conley v. Railroad Co.* (N. C.), 14 S. E. 303; *Price v. Water Co.* (Kan. Sup.), 50 Pac., 450. We are aware that there is very respectable authority which holds that a general allegation of negligence is sufficient, and that at common law it was not necessary, in a declaration for negligence, to set out the facts constituting the negligence. But our code of civil procedure has greatly changed the common law rules of pleading, and requires the facts constituting the cause of action to be set forth in ordinary and concise language. And in the case at bar facts sufficient should have been set forth to inform the defendant what act or omission

Courts are agreed on the passenger cases, but not on stock-killing cases.

constituted the negligence complained of. The judgment of the court below is reversed, with instructions to sustain the demurrer, and to give the plaintiff leave to amend his complaint. The costs of this appeal are awarded to the appellant.

Judgment reversed.

for Def.

P., C., C. & ST. L. R. R. CO. v. LIGHTHEISER.

163 Ind., 247. [1901.]

GILLETT, J. Appellee instituted this ~~suit~~ ^{action} against appellant to recover for an injury to his person. His complaint was in four paragraphs, to each of which appellant unsuccessfully demurred. Issues of fact were joined and there was a verdict and judgment for appellee. The errors assigned bring in question the rulings on the demurrers above mentioned, the overruling of a motion made by appellant for judgment in its favor on the answers returned by the jury to interrogatories, and the overruling of appellant's motion for a new trial. (u)

According to all the paragraphs of complaint, appellee, who was an employe of appellant, as a locomotive engineer, received his injury in the city of Logansport, during the nighttime by being knocked down and run over by a mail car belonging to appellant, which was being run backward in appellant's yards. It is averred in said paragraphs that appellee had been ordered to make a trip upon appellant's road; "that, in obedience to said order, plaintiff, as was his duty under his employment, took his position at a point between the tracks on which his locomotive was standing and the track in which said mail car was approaching, for the purpose of examining, accepting, and assuming control of said locomotive, when said locomotive began to move; and that said locomotive and the mail car passed him at the same time, leaving a space of but four feet between the locomotive and car, where he might stand. It is further alleged that while appellee was occupying this position, "as was his duty to do under his employment," he was knocked down and run over by said mail car. The first paragraph of complaint charges that "it was the duty" of appellant to provide said car with a person stationed on the forward end thereof, as it was being moved, supplied with a proper signal light, to warn

the appellee and other persons using the grounds between and adjacent to appellant's tracks, and also to provide said car with an airbrake attachment, so that said car could be stopped by a brakeman upon the discovery of any one in imminent peril of life or limb from being run over by said car. It is alleged that appellant negligently and carelessly omitted to take such precautions, and that appellee was run upon and injured by reason of the negligent movement as aforesaid. The second paragraph of the complaint counts on the negligence of the engineer in control of the locomotive which was moving said mail car. He is charged with negligently moving said car backward without having a person stationed on the end thereof, so as to perceive the first sign of danger and to signal the engineer, as required by a rule of appellant. Said engineer is also charged in said paragraph with negligence in moving said car in violation of certain ordinances of the city of Logansport. It is also alleged that appellee was run over by said car as a result of the negligence as pleaded. In appellee's third paragraph of complaint, it is alleged that "it was the duty" of appellant's yard conductor, who had charge of said car and the locomotive attached, to take the particular precautions which we have mentioned in connection with our statement as to the first paragraph of complaint. It is further alleged that such yard conductor negligently and carelessly omitted to take such precautions, and that by reason thereof appellee was run over and injured by said mail car. The fourth paragraph of complaint, like the first and third, contains a direct charge as to appellant's duty to take certain precautions; and it is further alleged that appellant employed an incompetent and inexperienced brakeman or flagman on said car, knowing him to be incompetent and inexperienced, and that the latter omitted to take the precautions which it is alleged that it was appellant's duty to take in connection with the movement of said car, and that, as a result, appellee was run over. Each of said paragraphs is quite long, and it is but just to appellee's counsel to state that there has been no attempt upon our part to exhibit all of the details of said paragraphs. It has only been our endeavor to make such a statement concerning them as would furnish a basis for this opinion.

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The first paragraph of complaint is insufficient. It is well settled that a complaint for negligence must disclose by proper averments the existence of a duty upon the part of the defend-

Here a failure to do something is complained of, as the act which caused the injury was done by a fellow-servant; now merely alleging that plain. & def. are

ant, or of the person alleged to be negligent, where it is a case of imputed negligence, as under an employer's liability act, to exercise care toward the person injured. *Muncie Pulp Co. v. Davis* (Ind. Sup.) 70 N. E. 875; *American Rolling Mill Co. v. Huling*, 161 Ind. 673 (67 N. E. 986), (69 N. E. 460); *Faris v. Hoberg*, 134 Ind. 269 (33 N. E. 1028, 39 Am. St. Rep. 261); *Louisville & C. R. R. Co. v. Sanford*, 117 Ind. 265 (19 N. E. 770); *Zimmermann v. Bauer*, 11 Ind. App. 607 (39 N. E. 299). The direct statement that it was the duty of the defendant, to do or not to do a certain act, is a mere conclusion of law. The rule is that facts must be alleged from which the law will imply the existence of the underlying duty. *Indianapolis etc. R. R. Co. v. Foreman* (Ind. Sup.) 69 N. E. 669, and cases cited; *Seymour v. Maddox*, 16 Q. B. 326; *Brown v. Mallett*, 57 Eng. Com. Law 598; *City of Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550; *West Chicago Street R. R. Co. v. Ceit*, 50 Ill. App. 640. And see *Hopper v. Covington*, 118 U. S. 148 (6 Sup. Ct. 1025, 30 L. Ed. 190). In *Brown v. Mallett*, *supra*, the declaration charged that "thereupon it became the duty of the defendant" to do certain things. Of this, Maule, J., said: "But the allegation now in question is open to the further objection that, however directly averred, it is an averment of matter of law only, and not of matter of fact. If the words had been that the defendant became bound by law to do certain acts, it could not be questioned that that was an allegation of matter of law; and the words 'it became the duty of the defendant,' if they were to be understood as averring the existence of some duty different from that arising out of a legal obligation, certainly would not aid the declaration, inasmuch as the breach of such a duty does not give a cause of action. But if they be understood, as we think they are, as averring the existence of a legal liability, it is well established that such an averment, being an averment of a matter of law, will not supply the want of those allegations of matter of fact from which the court could infer the law to be as stated, so that such allegation is useless where the declaration is insufficient, and superfluous when sufficient without it." *Seymour v. Maddox*, *supra*, was a master and servant case, where there was an express allegation of duty. In holding that the judgment must be arrested, Lord Campbell said: "The duty, a breach of which is laid, does not arise from the particular facts stated in the declaration, nor from the general relation of master and

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general duty. But when you allege that def. failed to prevent plain. from getting hurt, you are alleging a special

servant. What, then, is the effect of the positive allegation of such duty? I confess that I at first thought that where a relation from which a particular duty may arise is alleged, and the particular duty is also alleged, it might be shown in evidence that in fact such a duty did arise, and that it was unnecessary to set forth the facts themselves which raise the duty. But the decisions show that the allegation of duty is in all cases immaterial, and ought never to be introduced, for, if the particular facts raise the duty, the allegation is unnecessary, and, if they do not, it will be unavailing. In this case there is an allegation that it was the defendant's duty to light the floor and fence the hole, but no facts are stated from which the duty arises. The express allegation, therefore, will not help the defect, and the declaration is bad."

Returning to the paragraph of complaint under consideration, it is first to be observed, since the paragraph in question is drawn on the theory of a common law liability, that, for aught that is pleaded, the person who caused said car to be moved without having a brakeman or lookout upon it was himself a fellow servant of appellee, for whose acts or omissions appellant was not liable. *Southern Indiana R. R. Co. v. Martin*, 160 Ind. 280 (66 N. E. 886). It devolved upon appellee to show, by proper allegations of fact, that it was a duty which belonged to the master that had been neglected. *Southern Indiana R. R. Co. v. Harrell*, 161 Ind. 689 (68 N. E. 262, 63 L. R. A. 460). As was pointed out in the case last cited, the duty of the master with respect to providing a proper place to work does not require that the master should at all times keep the place safe, as against transient perils occasioned by the negligence of other servants who are engaged in executing the details of the work. There is enough to suggest in said first paragraph that possibly appellant was delinquent in the matter of omitting to furnish proper appliances, but there is not sufficient alleged in such particular. The allegations of the paragraph do not aid us in determining whether a duty existed. There is nothing in the pleading to advise us that it was dangerous to move a car backward in the yard at that particular time without taking the precautions alleged to have been omitted. Facts are not disclosed from which it can be said that it was the duty of appellant so far to apprehend the happening of such an occurrence as to create a duty upon its part to furnish special appliances to guard against such conse-

quences, and, as respects the air brake attachment, it is not alleged that such appliance is one which it is practicable to operate in the manner suggested.

In indicating that the facts disclosed do not show the existence of a duty, we are not unmindful of what is alleged as to where it was the duty of appellee to be under his contract. There are instances where the word "duty" may be used in a pleading, although perhaps not with the utmost propriety, in characterizing the nature of the plaintiff's employment, as where the word is used as descriptive of an ultimate fact as to the character of the work which he was required to do, as that one of the duties which plaintiff was employed to perform was to inspect his locomotive. In such an instance the allegation is one of ultimate fact, and is partially descriptive of what his contract was. But here it is sought to be shown that appellee was properly in a particular place, and he charges that it was his duty to be there under his contract of employment; thus attempting to characterize the contract without showing what the contract was. If a rule of the company required him to be at that particular point, the existence of the rule should have been pleaded, or, if it was necessary for him to be there in order to execute one of the details of his work, that should be alleged, or, whatever the fact might be which justified his presence at that point, it should be made to appear by an appropriate averment of fact. The attempted showing in the latter part of said paragraph as to what was the duty of appellant being insufficient, the whole burden of manifesting the existence of such duty is thrown upon the allegation that the appellee took a position as it was his duty to do under his contract. The sufficiency of such allegation must be judged by the purpose that it must serve, if the paragraph is to be held good, namely, to manifest that there was a duty owing to appellee. According to the allegation, he received an order to take his locomotive upon a trip. Now, if this order, from the nature of the contract of employment, implied that he must go to, and remain at, the place where he was injured, then there was a particular duty owing appellee, as contradistinguished from a general duty which might be shown to exist toward all employees working in the yards. To manifest this particular duty, appellee attempts to construe his contract, and this effort we must characterize, having in mind the purpose that it was designed to serve, as a mere conclusion. The pleader might as well have alleged that the

giving of the order to take his locomotive out upon the road implied, by virtue of his general contract of employment, that he was to assume a certain position until the time came to go upon such locomotive. In *Jeffersonville etc. R. R. Co. v. Dunlap*, 29 Ind. 426, this court, in speaking of some of the cases above cited, said: "The gravamen in each of these cases was that by virtue of a contract it became the duty of the defendant to do certain things which he neglected to do, whereby the plaintiff was damaged. It did not appear from the facts stated that the duty was imposed, and it was merely held that the averment that the duty existed was alleging a conclusion of law, and not of fact. This was in accordance with a rule of pleading long and well settled."

Speaking generally of the first paragraph of the complaint, it may be said that, in a pleading, facts must be directly and positively alleged, and it is not permissible to indulge in inferences in support of the pleading, although it might, be entirely legitimate to draw such inferences, had the question arisen as to the effect of evidence. *American Rolling Mill Company v. Hullinger*, 161 Ind. 673 (67 N. E. 986).

The objections pointed out to the first paragraph of complaint also condemn the third and fourth paragraphs. * * *

Judgment reversed, with a direction to sustain appellant's demurrers to the first, third and fourth paragraphs of complaint.

for def.

HORN v. LUDINGTON.

28 Wis. 81. [1871.]

LYON, J. This is an appeal from an order of the circuit court denying a motion that the plaintiff be required to make his complaint more definite and certain in the several particulars specified in the motion.

The complaint alleges that for a long time before, and until the summer of 1870, the defendant Ludington held in his name the legal title to certain property therein described, for the benefit of, and in trust for, the plaintiff and the defendants Cross, Ludington, Scott and Hobart, who, it is alleged, are the owners and tenants in common thereof in equal shares; that Ludington, while he held the title thereto, commenced negotia-

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tions with the defendant the Milwaukee and Northern Railway Company, to sell the same to that corporation for twenty thousand dollars; that pending such negotiations he executed a conveyance thereof to the defendant Donaher, pretending to have actually sold the same to him for about five thousand dollars; that the conveyance to Donaher was not made in good faith, but was without consideration, and was made by Ludington to defraud the other owners of the property, particularly the plaintiff, out of the same, and to prevent them from receiving the proceeds of the sale thereof then being negotiated with the said company, and that Donaher knew of the interest of the plaintiff in such property; that Ludington continued his negotiations with the railway company, and has consummated an agreement with it, by which the company is to pay him twenty thousand dollars for the property, but which sum has not yet been paid, and he is to deliver to the company a conveyance of the property to be executed by Donaher; that Ludington denies that the plaintiff is a part owner of the said property, pretends that he has no interest therein, and declares that he will not divide the proceeds thereof with the plaintiff. The complaint further alleges, in general terms, that the plaintiff rendered services, personal and professional, in the protection and management of such property, of the value of upwards of five thousand dollars, and paid, laid out and expended money in that behalf and for the benefit of the owners to the amount of about fifteen hundred dollars, all which he did after he acquired such interest in the property, and at the request of the owners, and in pursuance of an agreement with them at the time he acquired such interest, and as the consideration therefor.

The object and purpose of the action is to enforce the execution of the alleged trust by compelling a conveyance of the property to the owners, and, if that cannot be done, to secure an equitable division among them of the proceeds of the sale thereof.

The particulars specified in the motion relate, first, to the allegations of the existence of such trust, and, secondly, to the statement of the services rendered and the money paid by the plaintiff, as the consideration for his interest in said property.

The Revised Statutes, chap. 125, section 2, subdivision 2, provide that the complaint shall contain "a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition." Here the cause of action is the alleged

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trust, the same as in a money demand on contract the debt is the cause of action. If there be no debt, there can be no recovery; and in this action, if there is no trust, the plaintiff cannot recover. The cause of action, to-wit, the trust, is stated in the complaint, but the facts constituting such cause of action, to-wit, the facts which make Ludington a trustee of the plaintiff and others in respect to the property in controversy, are not therein stated. We think, therefore, that the plaintiff should have been required to make his complaint more definite and certain in this particular, by stating therein facts which will show that Ludington holds the title to the property as such trustee.

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As to the statement of the services rendered and money expended by the plaintiff in the protection and management of the property, if, in the progress of the action, it should become material to ascertain the extent and value of such services, and the amount of money so paid, and the purposes to which it was applied, the court may require the plaintiff to furnish a bill of items of the same, and may, and doubtless would, order a reference for the purpose of having the account thereof stated. The appellant will thus be furnished with the specific information which he desires, if it becomes material that he should have such information. We think the complaint sufficiently definite and certain in the latter particular.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to the circuit court to grant the motion requiring the complaint to be made more definite and certain to the extent indicated in this opinion.

for def.

X PEHRSON v. HEWITT.

79 Cal. 598. [1889.]

THORNTON, J. The plaintiffs bring this action to have certain judgments, and the executions issued thereon, and the levies made under them, vacated and set aside; that an adjudication in insolvency may be vacated, and the proceedings dismissed; and for an injunction restraining certain defendants, etc., from selling certain property described in the complaint. The defendants contend that the complaint does not state facts sufficient to constitute a cause of action, and that, therefore, the judgment

This case brings out the difference between negligence and fraud. Negligence, or want of care, as applied to a specific act, is a question for each juror to decide. Even in the

and order denying a new trial should be reversed. The defendants demurred to the complaint on the above-stated ground. The complaint sets forth that the defendant Hewitt was indebted to the several plaintiffs in several sums for divers matters; that they commenced actions against Hewitt in a justice's court to recover these amounts, and sued out writs of attachments, which were levied by the sheriff of the county upon the property of defendant Hewitt, set forth in the complaint; that before the commencement of these actions Hewitt filed in the same justice's court certain pretended confessions of judgment in favor of several defendants for certain amounts alleged to be due to each of the defendants, which confessions of judgment were accepted by the several defendants in whose favor they were made. Plaintiffs further allege that said pretended confessions of judgment were made by Hewitt and accepted by defendants with the intent and design of hindering, delaying, and defrauding the plaintiffs and other creditors of Hewitt by a combination among them, by which they were to levy executions upon all the property of Hewitt, and have the same sold for the amount of said confessions to said defendants, or some of them, and that after said sale had been made that Hewitt was to be placed again in full possession and control of the property for his own use and benefit, and fraudulently protected by such proceedings against the claims of plaintiffs, and thus rendering any judgments which plaintiffs might recover against Hewitt ineffectual. It is further averred that executions afterwards issued on the judgments above mentioned, and came into the hands of the defendant Eckels, who was a constable, and that the constable made a pretended levy under the said executions on the property above mentioned; that this levy was made and abandoned prior to the levy of the attachments of plaintiffs above set forth, and that since the abandonment the constable has never had possession or control of any of the property above referred to; that the constable pretends that the levies made by him are in full force, and that he is proceeding to sell said property under these levies. The defendant Hewitt is insolvent and was insolvent when he made the confessions of judgment above stated, and that in furtherance of the above stated agreement by defendants, and to carry out and complete the fraudulent scheme of defendants, did, on the 16th of March, 1886, file his petition in insolvency; that this petition was not filed in good faith, but for the wrongful and

negligence per se, however, it is entirely sufficient; here we have a standard fixed by law, and apply our standard to the circumstances. In ordinary neg-

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fraudulent purpose of defeating the attachment liens of plaintiffs, to the end that the pretended levies of the executions might hold the property, and a sale of the same might be made in such manner as to fraudulently cover it, and protect it from the claims of plaintiffs.

We see no element of fraud by defendants in the matters averred in the complaint. It is not averred that the debts for which the judgments were confessed by Hewitt, in favor of the several defendants, were not justly due by Hewitt to them. Styling the confessions of judgments "pretended," as was done by the plaintiffs in the complaint, did not show that they were so. The facts should have been set forth from which it would appear that they were pretended and simulated, and not real and genuine. There was no law in existence when the confessions were made which prevented Hewitt from confessing a judgment in favor of a bona fide creditor, and there is nothing alleged in the complaint which tends to show that the defendants were not honest creditors to whom Hewitt was justly indebted. The word "pretended" is a mere epithet, which, in the absence of facts showing the pretended character of the confessions or of the judgments, imports nothing impugning either the confessions or the judgments. It sufficiently appears that confessions of judgment were filed in the justice's court, that judgments were entered on them, and executions issued on the judgments. It is not sufficient to allege that confessions or judgments are fraudulent, but the facts showing that they are such must be averred, so that the court can perceive that such instruments are fraudulent. The facts showing the fraud must be made to appear by averment. See *Kinder v. Macy*, 7 Cal. 206; *Harris v. Taylor*, 15 Cal. 348; *Meeker v. Harris*, 19 Cal. 289, 290.

The debts for which the judgments were confessed being justly due by Hewitt, we see no fraud in the defendants agreeing to buy the property at the sale had on their executions, and, if they did buy it, giving it to Hewitt, if they elected to do so. To hold that they could not do so would be to hold that a man could not do what he chooses with his own property. The defendants, if they bought at the sale under execution, would pay their own money for the property bought, and when so bought and paid for it would belong to them, and they could do with it what they chose to do. They might give it away to Hewitt or any one else, or might destroy it if they saw fit. We cannot see how a court

Fraud is just like the negligence per se cases, since in fraud we have a fixed standard, and we must allege facts from which the law will infer negligence.

of equity can set aside an adjudication in insolvency or dismiss such a proceeding. It is averred that Hewitt was insolvent, and if so he had a right to apply for a discharge under the statutes in relation to insolvency. There can be no fraud in the pursuance of a remedy allowed by law. Hewitt, in applying for his discharge in insolvency, was taking the steps provided by law for having his property equitably and fairly subjected to the satisfaction of his creditors. Of this, no creditor has a right to complain. If he has no right to apply to be discharged from the claims of his creditors, they will have an opportunity of showing that, and preventing his discharge, in the insolvency proceeding. If the confessions of judgment made to defendants are prohibited by the insolvent laws, the assignee in insolvency can have them adjudged void, and on a proper proceeding they will be so adjudged, but no such proceeding is before us in this case. As the agreement made by defendants described above was free from fraud, we cannot see that the application in insolvency to carry out such arrangement could or would be fraudulent. We are of opinion that the complaint does not state facts sufficient to constitute a cause of action, and therefore the judgment and order are reversed, and the cause remanded, with directions to the court below to sustain the demurrer to the complaint, and for other proceedings according to law. So ordered.*

No fraud shown in insolvency proceeding. There can be no fraud in pursuing a legal remedy.

for def.

NICHOLS v. NICHOLS.

134 Mo. 187. [1896.]

MACFARLANE, J. A demurrer to plaintiff's amended petition was sustained and from the judgment thereon in favor of defendants she appealed. The petition was as follows:

"For amended petition herein, plaintiff complains and alleges that on the eleventh day of February, 1892, she was lawfully married to and became the wife of George Nichols. That from the date of said marriage till the ——— day of March, 1893, she and her said husband, George Nichols, continued to live together as husband and wife. That during all that time plaintiff faith-

action by wife for alienation her husband's affection

*See same rule applied to an answer. Nichols v. Stevens, 123 Mo. 96, Sukeforth v. Lord, 23 Pac. 236.

fully demeaned herself and discharged all her duties as the wife of said George Nichols; and she and her husband lived happily together and enjoyed the aid, support, companionship, society, and affection of each other.

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That the defendants, well knowing that plaintiff and George Nichols were husband and wife, and that they were living happily together, enjoying the aid, support, companionship, society, and affection of each other, wrongfully, wickedly, and maliciously acted and co-operated together, with the wrongful, wicked, and malicious intent to cause plaintiff's said husband to leave and abandon her, and to cease living with plaintiff as her husband, and to deprive plaintiff of the aid, support, companionship, society, protection, and affection of her said husband; and on the —— day of March, 1893, the defendants, pursuant to their said wicked, wrongful, and malicious intent, did wrongfully, wickedly, and maliciously entice, influence, and induce plaintiff's said husband to leave and abandon her; and her said husband, being influenced by and acting under the said wrongful, wicked, and malicious enticement, influence, and inducement of defendants, did then leave and abandon her, and being influenced by and acting under said wrongful, wicked, and malicious enticement, influence, and inducement, has ever since remained away from and separate and apart from her. And ever since said abandonment, the defendants have wrongfully, wickedly, and maliciously detained and harbored plaintiff's said husband, and have kept him separate and apart from her; and have by their said wrongful, wicked, and malicious acts and conduct deprived plaintiff, and still do deprive her, of the aid, support, companionship, society, protection, and affection of her said husband.

Wherefore, plaintiff says she is damaged in the sum of ten thousand dollars (\$10,000), for which sum and for costs she prays judgment."

Each defendant filed a separate demurrer, assigning as grounds thereof the following:

"1. Because the petition on its face fails to state any cause of action against this defendant.

"2. Because the petition fails to state or set out in detail the facts which it is claimed caused George Nichols, husband of plaintiff, to separate from her, and live separate and apart from her, plaintiff.

Third persons have no right to interfere with the relations of husband and wife, and every such interference is wrongful and actionable. Hence, here, the interference is

those principal, determinate, constitutive facts, upon the existence of which, as stated, the entire cause of action rests, so that, when denied, the issue thus formed with each would involve the whole remedial right." Section 526.

the ultimate fact is essentially in plaintiff's favor to her. She is not of so much evidence.

The ultimate fact which is constitutive of the cause of action in this case is that of wrongfully inducing the husband of plaintiff to abandon her. The methods adopted to accomplish that purpose are mere matters of evidence from which the ultimate fact is proved or may be inferred. Various methods may have been adopted to accomplish the purpose and a denial of them, if stated, would not form a single issue involving the whole remedial right. They would be probative, and not constitutive, facts. In the opinion of the jury an inference that defendants wrongfully induced plaintiff's husband to leave her might not be drawn from one or more acts proved, but might readily be drawn from them all taken in the aggregate. No issue could, therefore, be made upon each act and statement of defendants that would conclude the right of plaintiff to recover.

wrongfully inducing her to leave her, was a conclusion of law.

Wrongfully inducing plaintiff's husband to abandon her is a conclusion of fact depending upon the proof of acts, declarations, and conduct of defendants. It is not a conclusion of law, but a fact from which a legal conclusion is to be drawn. That legal conclusion was questioned in the first ground of the demurrer. Judgment reversed and cause remanded. All concur.

for plain.

KERR v. STEMAN.

72 Ia. 241. [1887.]

action for defendant wrongfully inducing her to leave her, was a conclusion of law.

Action to recover damages alleged to have been sustained by reason of the fraudulent representations of the defendant, by which the plaintiff, Eliza A. Kerr, was induced to sell and convey certain real estate. The defendant moved that the plaintiff be made to make a more specific statement of the facts constituting the fraud. The court sustained the motion. The plaintiff elected to stand upon her petition. Judgment was rendered against her for costs, and she appeals.

ADAMS, C. J. The petition shows clearly enough that the plaintiff was at one time the owner of certain real estate con-

but defendant wrongfully inducing her to leave her, was a conclusion of law.

this case arose on motion to make definite; but defendant says she would have been same result if discovered.

sisting of a town lot and an undivided third of a tract of 40 acres; that she employed the defendant to make an exchange of the same for other property; that he reported that he had negotiated an exchange, stating the terms, and she executed the required conveyances. The petition further states that the defendant made a false report, with the intent to cheat and defraud her; but wherein the same was false does not appear. She should have set out in what the falsity consisted, in order that the defendant might know what he should come prepared to disprove. The doctrine is elementary what whoever sets up a fraud must do more than allege fraud in general and abstract terms. He must set out the specific facts in which the fraud consists. The petition in this case seems to us to be clearly insufficient, and we think that the court did not err in sustaining the defendant's motion for a more specific statement.

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ROGERS v. CITY OF MILWAUKEE.

13 Wis., 610. [1861.]

By the Court, PAINE, J. This action was brought to restrain the execution of certain tax deeds upon certificates of sales of the plaintiff's land for taxes. The defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action, and the demurrer was sustained, from which order this appeal was taken.

Bill to restrain
sales of land
for taxes

It is undoubtedly true that a large part of the complaint is not good pleading. The plaintiff relied on an absence of preliminary proceedings, essential to the validity of the tax sales. But instead of averring either of his own knowledge or upon information and belief that such proceedings were not had, he only averred that he had searched in the proper offices for the evidence that they were had, and failed to find it. The only issue that could be made upon such allegations would be whether he had searched and found the evidence or not, which would be entirely immaterial.

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But while such was the character of a large part of the complaint, we think there was one defect averred with sufficient directness to save the complaint from being demurrable. It avers that the street commissioners were bound by law to give reason-

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able and timely notice, in order that the owners and occupants of lots on said street might do said work, and the plaintiff, on information and belief, denies that any such notice was given, etc. The giving of such notice was undoubtedly essential to the validity of the contracts on which the certificates were issued, and therefore to the validity of the sales. And the want of such notice is positively alleged on information and belief. This seems to us sufficient to make out a cause of action, and the order sustaining the demurrer must be reversed, with costs, and the cause remanded for further proceedings.

for plain.

DAVIS v. HOUGHTELIN, ET AL.

33 Neb., 582. [1891.]

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NORVAL, J. This is a proceeding in error to reverse the judgment of the district court of Jefferson county, sustaining a general demurrer to the petition of the plaintiff, and dismissing the action. The petition alleges: "(1) That she is administratrix of the estate of Daniel C. Davis, deceased, duly appointed according to law. (2) That the defendants are partners in trade, doing business as such at Fairbury, in said county, under the firm name and style of Houghtelin & McDowell. (3) That on or about the 28th day of March, A. D., 1888, said defendants were in the possession of certain premises at Fairbury, in said county, whereon they were engaged in the business of feeding cattle and hogs, and had, upon said premises, a quantity of feed and provender for said cattle and hogs; and plaintiff says defendants also kept and employed, in and about their said business, a certain servant and agent, one Allen Ireland, by name, for the purpose of guarding said feed, and whose business it was, in the due course of his employment by said defendants, to seize and detain persons who might be found disturbing such feed so provided by defendants. (4) That on said day the said Daniel C. Davis, then in full health and life, had occasion to go and be upon said premises of said defendants, and she says that while so there the said defendants, by their servant and agent, Ireland, who was then and there present, and acting for said defendants in the due course of his employment as aforesaid, and pursuant

to his instructions and orders, attempted to seize and detain, without any lawful process or warrant, the said Daniel C. Davis, deceased; and plaintiff avers that said defendants and their said servants so negligently, carelessly, and unlawfully managed their said business and attempt that the said Daniel C. Davis was then and there shot through his heart with a bullet from a pistol then and there negligently, carelessly, and unlawfully had and held in the hands of defendants' said servant, said Ireland, and said Daniel C. Davis was then and thereby instantly killed. (5) Plaintiff avers that the death of said Daniel C. Davis, as aforesaid, was caused by the wrongful and unlawful act, neglect, and default of said defendants, and without any just or sufficient cause, provocation, or fault on the part of said decedent; that they, said defendants, knowingly and intentionally employed said Ireland for the purpose of assaulting and attempting to detain, without process or warrant, persons who might go upon their said premises as aforesaid; and that they well knew that their said servant, Ireland, was so armed with said pistol in their said employment, and was likely to so negligently, carelessly, and unlawfully use the same in and about their said business and employment, and that great personal injury and damage, or loss of life, was liable to ensue thereby and therefrom, yet they, said defendants, notwithstanding, did not and would not prevent and forbid their said servant, but did carelessly, negligently, and unlawfully permit him in the premises, contrary to their duty in that case. (6) Plaintiff further states that said Daniel C. Davis, deceased, left surviving him his widow, this plaintiff, and the following named children, his next of kin and heirs, to-wit: Albert L. Davis, aged 17 years; George Davis, aged 14 years; May Davis, aged 12 years; Ella Davis, aged 10 years; Stella Davis, aged 8 years; and Emory Davis, aged 2 years,—all residents of the same county; and she says that they have sustained damages by reason of the wrongful act, neglect, and default of defendants, as aforesaid, in the sum of five thousand (\$5,000) dollars."

This is an action to recover damages for the killing of plaintiff's intestate by one Allen Ireland, who, it is alleged, was at the time in the defendants' employ. The general principle that a master is liable for injuries to third persons resulting from the negligence of the servant while in the line of his employment is familiar. It is equally well settled that a master is not responsible for the willful and tortious act of his servant committed out-

side of the scope of his employment. *Miller v. Railroad Co.*, 8 Neb., 219; *Tuller v. Voght*, 13 Ill., 277; *Oxford v. Peter*, 28 Ill., 434; *Moir v. Hopkins*, 16 Ill., 313; *De Camp v. Railroad Co.*, 12 Iowa, 348; *Cooke v. Railroad Co.*, 30 Iowa, 203; *Carter v. Railway Co.*, 98 Ind., 552; *Gravel Road Co. v. Gause*, 76 Ind., 142; *Meehan v. Morewood*, (Sup.) 5 N. Y. Supp., 710; *Lafitte v. Railroad Co.*, (La.) 8 South. Rep., 701; *Fraser v. Freeman*, 43 N. Y., 566; *Cooley*, Torts, 533 et seq.

The sufficiency of the petition, therefore, depends upon whether it charges that the act of killing Davis was done in the prosecution of the defendants' business, and within the range of the servant's employment. The third paragraph of the petition charges that Allen Ireland was employed by the defendants to guard certain feed belonging to them upon their premises, and to seize and detain persons who might be found disturbing such feed. This is the only allegation of fact in the entire pleading relating to the nature and scope of Ireland's employment. As to the act of killing, it is averred, in effect, that the deceased had occasion to be upon defendants' premises, and while so there said Ireland, in attempting to seize and detain said Davis, negligently, carelessly, and unlawfully shot and killed him. There is no allegation that Davis was molesting the feed, or attempting so to do, or that it was any part of Ireland's duty to seize and arrest persons who happened to be upon the premises, except those who were there for a specified purpose. It is obvious that the averment in the fourth paragraph of the petition, that Ireland "was acting for said defendants in the due course of his employment as aforesaid, and, pursuant to his instructions and orders, attempted to seize and detain," is a mere conclusion, and not a statement of any fact, showing that the attempted seizure and detention of Davis was within the range and authority of Ireland's duties. Likewise the allegation in the fifth paragraph, that Davis' death "was caused by the wrongful and unlawful act, neglect, and default of said defendants," is the statement of a conclusion of law, which the demurrer does not admit. It is only facts that are well pleaded which are confessed by general demurrer. So far as the allegations in the petition are concerned, or the legitimate inferences to be drawn therefrom, Ireland's employment was exclusively in guarding and protecting the feed, and the wrong charged was something which his agency did not contemplate, and which he could not lawfully

What a man is employed to do & whether a certain act is within the scope of his employment, is a conclusion of fact. But here the facts do not justify the conclusion of fact drawn. The trouble of this case is, that

do in the name of the defendants. His business no more contemplated the seizure of a person who was upon the defendants' premises for a lawful purpose than it did the arrest and detention of a person lawfully passing along the public highway near the property, and in neither case would the defendants be liable for the act. The test of a master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was committed in the prosecution of the master's business. * * *

Judgment affirmed.

for def.

JACCARD v. ANDERSON.

32 Mo., 188. [1862.]

DRYDEN, Judge, delivered the opinion of the court.

The plaintiffs, as the last endorsers of a promissory note, sue the defendant, as first endorser. Their petition is as follows, viz.:

"Eugene Jaccard, Augustus Mermor, and D. Constant Jaccard, plaintiffs, v. William C. Anderson, Jr., defendant. In St. Louis Circuit court, St. Louis county.

"Plaintiffs, by Alex. J. P. Garesche, their attorney, state that they are partners, associated together as E. Jaccard & Co.; that Washington King, by his negotiable note herewith filed, dated April 16, 1856, promised to pay to defendant, or his order, one thousand dollars, one year after date; that defendant assigned by endorsement and delivered said note to E. H. Bussell, and said E. H. Bussell assigned by endorsement and delivered same to the plaintiffs. Plaintiffs further state that said note was not protested at the defendant's instance and request, he waiving protest; that no part of said note has been paid. They further ask judgment for said sum of one thousand dollars, interest, and costs.

ALEX J. P. GARESCHÉ,

Attorney for plaintiffs."

The defendant answered, and a trial of the case was had, and a verdict and judgment was rendered for the plaintiffs. Several exceptions were taken in the progress of the trial, which it will be unnecessary for us to notice. In due time the defendant moved in arrest of the judgment because of the insufficiency of the

Negotiability is the legal effect of certain specific words.

*Action by
one endorser
against first
endorser v
note.*

petition, and the motion being overruled, he excepted and appealed to this court.

on does sufficiently re facts showing that note was liable, or def. liable as guar of a neg. note

The petition is defective in not stating facts sufficient to constitute a cause of action. In order to render an assignor liable to the assignee it must appear by the petition, either that the note assigned is negotiable, or if not negotiable, that the maker was insolvent or non-resident of the state; or that the assignee, in the diligent prosecution of a suit against the maker, had been unsuccessful in making the debt. It does not appear by any averment or fact in this case that the note assigned was a negotiable instrument, nor are such facts shown as are necessary to impose a liability upon the defendant as assignor of a note not negotiable. True, it is stated, or rather recited in the petition, that the note is negotiable; but this is the statement of the conclusion or opinion of the pleader, not the averment of a fact upon which issue could be taken or the judgment of the law be pronounced. The operative words in a negotiable note under the law of this state are "for value received, negotiable and payable without defalcation," and their employment in the instrument declared upon must appear in the petition in order to enable the court to see and pronounce the legal effect of such instrument.

is there sufficient element of demand or excuse for failure to demand

Again, supposing the note declared upon negotiable, the averment of an essential element of the defendant's liability is omitted in the petition, viz.: the demand or excuse for failure to demand payment of the maker. It is averred that "at defendant's instance and request the note was not protested, he waiving protest," and it is urged in the argument that his waiver is in law a waiver of demand. However this may be (and we express no opinion upon the point), it does not reach the point of difficulty. The question under consideration is a question of pleading; the effect of the waiver of protest is a question of evidence. There must be an averment of a demand, or of the facts which will excuse and be equivalent to it, in order to show the defendant's liability. What effect the waiver of protest may have in proving the excuse alleged is another matter. Its sufficiency for the purpose renders the averment in the petition none the less necessary.

The court erred in overruling the motion in arrest, and for this cause its judgment is reversed and the cause remanded, with directions to permit the plaintiffs to amend their petition, if they desire to do so. The other judges concur.

for def.

BANK OF TIMMONSVILLE v. FIDELITY & CASUALTY
COMPANY.*120 Fed. (C. C.), 315. [1903.]*

SIMONTON, Circuit Judge. This case comes up on a rule to show cause why the complaint should not be made definite and certain in the particulars mentioned. The Code of Procedure of South Carolina does not prescribe the mode in which the object now sought can be attained. Code, Sec. 181. The usual course is to do this by motion. *Nicholas v. Briggs*, 18 S. C., 473. But the course now taken is just as effective. The action is brought by the plaintiff, the Bank of Timmons ville, against the Fidelity & Casualty Company of New York, upon a bond or policy of insurance issued by the defendant to the plaintiff, whereby the defendant agreed, on certain conditions, to make good and reimburse any loss plaintiff might sustain by reason of the fraud or dishonesty of one Lechner, its cashier, committed during the term of the policy.

The particulars in which it is sought to make this complaint more definite and certain are:

(1) By setting forth in full the policy of insurance or bond mentioned in paragraphs 3, 5, 6, 8, and 10, of the complaint. Under the rules of Code pleading, it is not necessary to set out in haec verba written instruments sued on. They may be set out according to their legal effect. 6 Cyc. Pl. & Prae., 263, and cases cited 4 Cyc. Pl. & Prae., 916, 3 Cyc. Pl. & Prae., 645. This, also, is the rule of pleading in the Federal Court. In *Sheehy v. Mandeville*, 7 Craneh, 217, 3 L. Ed., 320, Marshall, C. J., says:

"It is not necessary to recite the contract in haec verba, but, if it be recited, the recital must be strictly accurate. If the instrument be declared on according to its legal effect, that effect must be truly stated. If there be a failure in one respect or the other, an exception for the variance may be taken, and the plaintiff cannot give the instrument in evidence." So 1 Chitty, Pl., 430.

"It is a principle of pleading that a party relying on a deed, etc., either as a foundation of a cause of action, or as a ground of

*Not necessary
to set forth
a written
instrument
haec verba
to give its
legal effect
is enough*

defense or answer to the pleading of his opponent, shall make profert of the instrument; that is, produce it nominally in court. But in alleging the deed the plaintiff need not, in his pleading, show more of it than answers his own purpose, and even that part which he states may be set forth according to its legal purport or in substance."

If, in such a case, the opposite party wants the deed to be actually produced, he must pray over. Chitty, Pl. p. 429.

This complaint sets out the contract thus:

"That on the 18th day of March, 1891, the defendant, then engaged, among other things, in the business of fidelity and casualty insurance, in consideration of a premium of thirty-seven and 50-100 dollars paid to it by the plaintiff, then and now engaged in the banking business, made the plaintiff its policy of insurance, whereby it agreed that during a term beginning on the 17th day of March, 1891, and ending on the 17th day of March, 1892, and during any subsequent renewal thereof, it would, at the expiration of the three months next, after satisfactory proof to the said company of any loss, make good and reimburse to the employer, to the extent of the sum of five thousand dollars, such loss, if any, as the employer should sustain by reason of the fraud or dishonesty of the employed, F. C. Lechner, in connection with his duties as cashier of said bank, or the duties to which the employer might thereafter assign or appoint him, provided such fraud or dishonesty should be committed during the continuance of said term, or any renewal thereof, and discovered during said continuance, or within six months thereafter, and within six months after the death, dismissal or retirement of the employed."

This is sufficient.*

*"The petition itself is not beyond criticism under the rules of good pleading (although it follows what seems to have become a not unusual practice) and if it had been demurred to on the statutory ground that it did not state facts constituting a cause of action, the demurrer should have been sustained. The statute requires the facts constituting the cause of action to be stated. By this is meant the ultimate facts as distinguished from the evidentiary or argumentative facts. The statute in this respect lays down for the code pleader in clearer terms the same rule that the common law on this subject prescribes,

that is, that a plea must not be argumentative. To set out in the petition haec verba the contract on which the case is founded is to plead the evidence, not the facts. A pleader should determine in his own mind the legal effect of the written contract or other document that underlies his case, and plead it by its legal effect as he understands it. It is wrong to set out in the petition a contract, and then to say, out in the petition, a trial issue, that underlies his case, and plead it by its legal effect as he understands it. Hence it is not mere evidence.

The written instrument is the contract itself, not merely evidence of it. But the res.

Nor is it essential to good pleading that a copy of the instrument sued on be attached as an exhibit to the complaint. Rule 11 of the court says:

"It shall not be necessary for a party to set forth in a pleading, the items of an account therein alleged, but he shall deliver to the adverse party within ten days after demand therefor, in writing, a copy of the account and every bond, deed or other writing sued on, which, if the pleading be verified, must be verified by his own oath or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof." * * * Rule discharged.

Not need a copy
of written in-
strument be
attached to
complaint.

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(b) *The Facts to be Stated.**

× HILL v. BARRETT.

14 B. Monroe, 83. [1853.]

Judge MARSHALL delivered the opinion of the court.

This is an action by petition under the code, in which the plaintiff seeks to recover the value of certain brick alleged to have been made by him on the premises of the defendants. From the written contract referred to and filed as a part of the petition, and which is thus made a part of the record, it appears that Hill undertook to make, burn, and lay for the defendants, two hun-

it, and as he purposes to maintain it. If the instrument is merely copied into the petition it leaves uncertain the issue intended to be tendered, depending on the construction that may be put upon it at the trial. Our code pleading furnishes no authority for such uncertainty. But where, as in this case, no demurrer is filed and no objection is made to the petition until the trial is on, it comes too late, if, by construing the petition then as stating what the evidence pleaded tends to prove, it constitutes a cause of action. This petition is susceptible of such construction."—Valliant J., in *Reilly v. Cullen*, 159 Mo. 322.

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*The substantive law of contracts, or of torts, or of whatever topic is involved, determines what facts are essential to constitute a given cause of action; and these, of course, are to be stated, because that is the function of the complaint, both at common law and under the code. The law of pleading does not undertake to determine what facts are necessary to the cause of action, any more than the law of evi-

It is a question of law what is the fair
meaning of language used; it is question
of law what obligation it imposes. Courts

dred thousand merchantable bricks, at such place as said defendants may designate at the Grayson Springs, the plaintiff furnishing all the materials, boarding, etc., for which the defendants agreed to pay him seven dollars and fifty cents per thousand, not counting the openings in the buildings, to be paid in one, two and three years, except one hundred dollars, to be taken out in boarding at the springs. But it is provided that the defendant have the privilege of not putting up said buildings the next spring if they choose, in which event they were to pay the plaintiff four dollars and fifty cents per thousand (kiln count), in the manner and times above stated; and Hill bound himself to complete said building, or laying of said brick, on or before the first day of the next June, provided said defendants notify him by the first day of the next March, of their intention to have said brick laid the next spring. But the defendants undertook to build the foundation on which the said bricks were to be laid, in time for laying the brick the next spring, provided they elect to build.

The plaintiff, without setting out any part of this agreement in the petition, but stating that one was entered into by the parties In August, 1849, avers, that after its date, he made and burnt on the premises of the defendants, in the year 1849, one hundred and seventy thousand merchantable bricks; that they were not laid and put into a house, because the defendants did not notify him that they intended to have the building put up, and did not have the foundation laid in time for him to build the said house by the first day of June, 1850, or any other time, but they elected that they would not build said house, whereby he was prevented from making and laying the two hundred thousand bricks contracted for; and he claims payment for the one hundred and seventy

dence undertakes to determine what facts must be proved in order to sustain it.

When a pleading is adjudged insufficient for failure to state a cause of action, the question ordinarily decided is one of substantive law rather than of pleading. And yet this subject cannot be wholly relegated to the domain of substantive law. When a general demurrer is interposed to a complaint, very often two questions are presented: Is a given "fact" essential under the rules of substantive law? And if so is it sufficiently alleged? Here the rules of pleading must be taken into account. How far will "judicial notice," or "presumptions," or implication and intendment supply the place of express averment? These, in part, at least, are problems in the law of pleading, and must be treated as such.—Ed.

Code is more strict than common law as regards pleading the incorporation of a corporation. Nearly all modern cases

thousand bricks at the rate of four dollars and fifty cents, kiln count. A demurrer to this petition was sustained, and judgment having been rendered against the plaintiff, he brings the case to this court for revision.

Although the code of practice has abolished not only the pre-existing forms of action, but also the pre-existing forms of pleading, and has declared, that henceforth, the forms of pleading, and the rules by which their sufficiency is to be determined, are those prescribed in the code itself; it adopts what has always been a cardinal rule with respect to the allegation of the plaintiff, now called the petition, that it must contain a statement of the facts constituting the plaintiff's cause of action, with scarcely any other specific requisition, but that it be made in ordinary and concise language, without repetition. Title 7, chapter 1, section 144, p. 30, 31. But while the code contains a very few additional rules with respect to the mode or manner of alleging the facts relied on as constituting a cause of action, it does not, and could not, particularize the facts necessary to be stated, nor give any affirmative rule more special or more instructive than that which requires that the petition shall contain the facts constituting the plaintiff's cause of action. The code makes no change in the law which determines what facts constitute a cause of action, except that by reducing all the forms of action to the single one by petition, it changes the question whether the plaintiff's statement of his cause shows facts constituting a cause of action in trespass, or assumpsit, or other particular form, into the more general question, whether it shows facts which constitute a cause of action at all, that is, whether the facts stated are sufficient to show a right in the plaintiff, an injury to that right by the defendant, and consequent damage. What facts do in this sense, constitute a cause of action, is determined by the general rules or principles of law respecting rights and wrongs, and by a long course of adjudication and practice, applying those rules to particular actions, under the long established rule of pleading, that the declaration must state the facts which constitute the plaintiff's cause of action. In adopting this fundamental rule of pleading, the code must be considered as adopting also the prevailing and authoratative exposition of it as understood at the time, except so far as the code itself, either expressly, or by necessary implication, requires facts to be stated which need not before have been

Plain, he merely refers to the facts and failed to show how def. became obligated to pay for the bricks. "Was not proper manner of pleading never saw

In other cases Code is more liberal. In general, courts are rather more liberal, more inclined to give effect to things al-

stated, or dispenses with the statement of facts formerly deemed necessary.

The express dispensations apply rather to the form of statement than to the facts to be stated. They are to be found principally in chapter 7, of the title heretofore referred to, in sections 175, and 176, page 36: The implied dispensations grow mainly out of the reduction of all actions to one form. The requisition of additional facts may be implied from the abolition of that rule which had formerly made it sufficient, and indeed, proper, to state facts according to their legal effect, instead of stating them as they actually occurred, which the code seems to require by the rule that they shall be stated in ordinary language. The code does not authorize a recovery upon a statement of facts which did not constitute a cause of action in some form, before the code was adopted. And, therefore, the former precedents, and rules, and adjudications, may now be restored to as authoritative, except so far as they relate to the distinctions between the different forms of actions, or to merely formal or technical allegations, and except so far as particular allegations formerly deemed substantial are dispensed with, or so far as particular allegations may now be necessary where allegations, according to the legal effect of the facts, may formerly have been sufficient.

Under this view of the present law of pleading, we are of opinion, that the petition in this case is defective in not stating either in terms or in substance the contract for a breach of which the action is brought. It is not sufficient to state that on a named day the plaintiff and the defendants entered into a contract signed by them, which is herewith filed, made part hereof, marked A—that the plaintiff, in pursuance of the contract, did and performed certain acts, and that the defendants either did or failed to do certain acts on their part in violation of the agreement. The rule of the code before referred to, requires that the petition shall state the facts constituting the cause of action; and, although in another section, it also requires that where the action is founded on a writing, the writing shall be filed as a part of the petition, which, as we think, implies that it shall also be referred to in the petition, there is, in our opinion, no dispensation, either express or implied, with the necessity of stating in the petition so much of the contract as shows that the plaintiff, by reason of the alleged acts or omissions on his part, and of those on the part of the defendants, is entitled to an action and to relief. The petition must

contain in its own body, and not merely by reference to another paper, a statement of the facts constituting the cause of action.

But if the petition in this case had set out the entire contract, it would still be defective, either in not stating that the one hundred and seventy thousand bricks, for which payment is demanded, were made and burnt at the Grayson Springs, at the place designated by the defendants, if they did designate any, or in not stating that the defendants had accepted the bricks actually made. We are inclined to the opinion that the election of the defendants not to build in the spring, 1850, was a dispensation with further performance by the plaintiff, which entitled him to be paid, according to the price stipulated in that event, for the bricks previously made, in pursuance of the contract. And even if this be not so, the plaintiff was entitled to be paid for his work and materials made and furnished for the use of the defendants, and under their employment, as much as they were reasonably worth, provided they were either accepted by the defendants, or were furnished at the place stipulated. But as the plaintiff has not averred, and could not have averred, that he had done all which was by the contract to be done on his part, he should have shown by positive statements of facts, that what he did do, was beneficial to the defendants in the manner contemplated by the contract, or that it was accepted by them. It is not sufficient to say, that in pursuance of the agreement, he made and burnt one hundred and seventy thousand bricks on the premises of the defendants.

Wherefore, the judgment is affirmed.

WILKINS v. STIDGER.

22 Cal., 232. [1863.]

CROCKER, J., delivered the opinion of the court—COPE, C. J., concurring, and NORTON, J., concurring specially.

This action was commenced by one McDaniel against the defendant to recover a demand for services as a surgeon and physician. The complaint avers that the plaintiff, McDaniel, is a physician and surgeon, and was employed by the defendant to perform services for him as such, which he did at the special instance and request of the defendant, and the nature of the services per-

formed are then described; that for such services defendant is justly indebted to him in the sum of \$2,855 over the above all payments; that the plaintiff has demanded payment from the defendant, but he has refused to pay the same. The complaint also avers, that defendant is indebted upon a promissory note, which is set out. When the case was called for trial, on motion of the counsel for the plaintiff, the name of Wilkins, the assignee of McDaniel, was substituted as plaintiff. The plaintiff recovered judgment; defendant moved for a new trial, which was denied, and he appeals.

The first error assigned is that the complaint does not state facts sufficient to constitute a cause of action, because that portion of the complaint which sets forth the claim for professional services does not aver any promise to pay, or that the services were of any value. We think the complaint in this respect sufficient. It follows substantially the form of a count in debt, under the old system of pleadings. By transposing the averments, it can then be read in this way: that the defendant was at a certain time indebted to the plaintiff, in a certain sum for professional services rendered by the plaintiff at the special instance and request of the defendant. The promise to pay, alleged in the common counts in assumpsit, was a mere conclusion of law from the facts stated, and as the new code only requires the facts to be stated, they are sufficient without setting forth the conclusions of law arising from those facts.* But, even if the complaint was in this respect defective, it is too late to make the objection after verdict. It should be made by demurrer. *Osgood v. Davis*, 5 Cal., 453; *Suter v. Cox*, id., 415; *Garcia v. Satrustegui*, 4 id., 244. * * *

Reversed and remanded for error in admitting improper evidence.

*Accord: *Farron v. Sherwood*, 17 N. Y. 227; *Higgins v. Germaine*, 1 Mont. 230. But see *Railroad Co. v. Kimmel*, 58 Mo. 83, in which the petition alleged that the defendant was plaintiff's treasurer, etc., and that "He, as treasurer of plaintiff, on final settlement, on to-wit, the 5th day of July, 1872, was indebted to plaintiff in the sum of \$298.42, balance on his settlement as treasurer." And the court said: "The petition in this case is defective in its omission to state the defendants' promise, which, though implied in law, must be pleaded as a fact."

A promise to pay is an essential conclusion in an implied contract, as for services rendered or requested, since not all services so rendered

X MINING COMPANY v. McFADDEN.

180 U. S., 533. [1900.]

Mr. Chief Justice FULLER delivered the opinion of the court:

The Mountain View Mining & Milling Company had made application for a patent on a certain lode-mining claim in the land office at Spokane, Washington, against which McFadden and others duly filed their protest and adverse claim, and thereupon brought this action "in aid of their said adverse claim, and to determine the right of possession," in the Superior Court of Stevens county, Washington, which was removed on the Mining Company's petition into the Circuit Court of the United States for the District of Washington, but not on the ground of diverse citizenship. Plaintiffs moved to remand the cause, and the motion was denied.

The petition for removal set up "that the controversy herein is a suit of a civil nature arising under the Constitution and laws of the United States, brought in pursuance of the provisions of § 2326 of the Revised Statutes of the United States, providing for the filing of adverse claims against the application for patent for mining claims, and the bringing of suits in support of said adverse claims."

The petition also set forth that the construction of two acts of Congress was involved, namely, an act approved July 1, 1892 (27 Stat. At L. 62, ch., 140), entitled "An Act to Provide for the Opening of a Part of the Colville Reservation, in the State of Washington, and for Other Purposes," and an act of February 20, 1896 (20 Stat. At L. 9, ch., 24), entitled "An Act to Extend the Mineral Land Laws of the United States to Lands Embraced in the North Half of the Colville Indian Reservation." But the jurisdiction of the Circuit Court on removal depended on plaintiff's statement of their own claim, and that only disclosed an action brought in support of an adverse mining claim.

In *Blackburn v. Portland Gold Min. Co.*, 175 U. S., 571, 44 L. Ed., 276, 20 Sup. Ct. Rep., 222, and *Shoshone Mining Company v. Rutter*, 177 U. S., 505, 45 L. Ed., 864, 20 Sup. Ct. Rep., 726, we held that a suit brought in support of an adverse claim under the Revised Statutes, §§ 2325, 2326, was not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on the Federal Court regardless of the citizenship of the parties.

Here the land in controversy was situated on an Indian reservation & properly came under U. S. jurisdiction, but plain. had failed to allege this fact and the court

Suit in
defense of a
adverse
claim to
mining
property
taken up
by patent
in the
U. S. land
office

U. S. court
has no
jurisdiction

It is conceded by counsel on both sides that those decisions are controlling, unless the Circuit Court was entitled to maintain jurisdiction by taking judicial notice of the fact "that the Mountain View Lode Claim was located upon what had been or what was an Indian Reservation," and "of the act of Congress declaring the north half of the reservation, upon which the claim was located, to have been restored to the public domain;" notwithstanding no claim based on these facts was stated in the complaint. But the circuit court could not make plaintiff's case other than they made it by taking judicial notice of the facts which they did not choose to rely on in their pleading.* The averments brought no controversy in this regard into court, in respect of which resort might be had to judicial knowledge. Thayer, Treatise on Evidence, ch. VII; Oregon S. L. & U. N. R. Co. v. Skottowe, 162 U. S., 490, 40 L. Ed., 1048, 16 Sup. Ct. Rep., 869.

In Spokane Falls & N. R. R. Co. v. Ziegler, 167 U. S. 65, 42 L. Ed. 79, 17 Sup. Ct. Rep., 778, plaintiff alleged in his complaint that he was in the possession as a pre-emptor, of a tract of land, and entitled to a patent for the same from the United States; that the defendant company, being a corporation of the territory of Washington, had seized a strip of this land and appropriated it for railroad purposes without his consent and without having compensated him therefor; but that the entry on and seizure of the land was under and pursuant to the laws of the territory of Washington authorizing railroad companies to appropriate land for right of way for railroad tracks. As we had judicial knowledge that the authority of the territory to legislate in respect of the right of a territorial railroad corporation to enter upon the public lands of the United States was derived from the act of congress of March 3, 1875, we held that the plaintiff's complaint disclosed the case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an act of Congress. The case before us affords no such basis for sustaining the jurisdiction.

In Powell v. Brunswick County Supers., 150 U. S., 433, 440, 37 L. Ed., 1134, 1136, 14 Sup. Ct. Rep., 166, 168, we said: "If it appear from the record by clear and necessary intendment that

*Contra by statute in Missouri; see Mo. R. S. 1899, sec. 631; Carth v. Caldwell, 72 Mo. 622.

Although a fact may be quite generally known to the court, still if plaintiff bases any claim on that fact, he must plead it. But judicial notice may serve to explain

the Federal question must have been directly involved so that the state court could not have given judgment without deciding it, that will be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the state as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusion upon the matters actually presented and considered." And see *Yazoo & M. R. R. Co. v. Adams*, 180 U. S., 41, ante 415, 21 Sup. Ct. Rep., 256.

The result is that *the judgment of the Circuit Court of Appeals must be reversed; the judgment of the Circuit Court must also be reversed*, and the cause be remanded to that court with a direction to remand it to the state courts, the costs of this court and of the other courts to be paid by the Mountain View Milling & Mining Company.

So ordered.

for def - Mc Fadden.

McELWAIN v. WALL.

159 Ind., 557. [1902.]

JORDAN, J. * * * Appellant's statement of the record discloses that the first paragraph of the complaint alleges that the plaintiff was employed by the defendant as a common laborer to work on the building; that he was inexperienced, and not a skilled workman, and of this fact the defendant had knowledge: that on or about Oct. 21, 1899, while the plaintiff was so employed about the building, defendant's superintendent "carelessly and negligently ordered him to climb upon a plate or chord constituting a part of the building—which order plaintiff was bound to obey,—and to throw down some planks or boards; that the plaintiff did not assist in constructing the chord, and did not know how it was placed and held in position, and did not know how it should be held or fastened in position; that he did not know of the unsafe condition of said chord or plate; or that the same was not properly fastened and tied in position; that the defendant and its said superintendent knew at the time plaintiff was ordered upon said plate or chord to throw down said planks or boards that said plate or chord was not tied and fastened, and was unsafe to go upon, and was liable to turn or fall when said

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boards or planks were thrown down, and to throw plaintiff off and fall upon and injure him," etc. After the averment of these facts it is alleged, "that while the plaintiff was in the performance of his work in throwing down said planks or boards, and while exercising due care and diligence, said plate or chord suddenly, without any warning whatever, turned and fell, and threw plaintiff violently to the ground, thereby injuring him," etc. These are all of the facts, as we take them from the statement of appellant, which can be said to show that appellant, as the master, had violated some duty, which he owed to appellee as its servant. When reduced to a simple proposition, they may be said to show: (1) That appellee was an unskilled or inexperienced workman, of which fact appellant had knowledge: (2) that appellant's superintendent "carelessly and negligently" ordered appellee to climb upon a plate or chord constituting a part of the building to throw down some planks or boards, which order, as alleged, he was bound to obey; (3) that he did not know of the unsafe condition of the plate or chord; (4) that appellant and the superintendent did know that the chord or plate in question was unsafe. It will be observed that there is no direct or positive averment which discloses that the chord was in any manner unsafe or improperly constructed, or that the place where appellee was directed to go was one of danger; but the condition of the chord to the turning of which the accident is attributed is left wholly to inference or surmise. The bare averments that appellee was negligently ordered to go upon the chord or plate to throw down some boards, and that he did not know that the chord was unsafe, but that appellant was aware of that fact, are certainly not sufficient, under the circumstances, to charge appellant with actionable negligence. From the two facts, as averred, that appellee did not know that the chord was unsafe, but that appellant did know it was unsafe, the ultimate or issuable fact that the chord or plate in question was unsafe is left to be inferred. The question with which we have to deal is not one in regard to evidence, but one which relates to pleading. While a court, in dealing with evidence, may be justified in drawing inferences from certain items of evidence, still it is not warranted in resorting to inferences or deductions, where the question involved pertains to the sufficiency of pleading; for the rule recognized at common law and by our code affirms that material facts necessary to constitute a cause of action must be directly averred, and cannot be left to

Every material fact must be pleaded that issue can be taken on it.

Rule is to construe the facts constituting gist of action more strictly than

depend upon or to be shown by more recitals or inferences. Avery v. Dougherty, 102 Ind., 433, 2 N. E. 123, 52 Am. Rep., 690; Erwin v. Telegraph Company, 148 Ind., 365, 46 N. E. 667, 47 N. E. 663, and cases there cited. A plaintiff who seeks to recover on the ground of negligence, among other things, is required in his complaint to sufficiently allege actionable negligence on the part of the defendant. Railway Co. v. Young, 146 Ind., 374, 45 N. E. 479, and cases cited. It is evident that the pleading in question does not respond to the requirements of the rules which we assert, for there is an entire absence of any positive or direct charge to show that the chord of the truss which turned and threw appellee to the ground was unsafe or defective, or that the place to which he was directed to go and engage in throwing down boards was one of danger. The paragraph, at least for the reason stated, was insufficient on demurrer. From the statements made by appellant's counsel, the second paragraph of complaint is open to the same objections imputed to the first, and at least for the same reasons is bad.

The judgment is therefore reversed, and the cause remanded to the lower court, with instructions to sustain the demurrer to the first and second paragraphs of complaint, with leave to appellee, if requested, to amend his complaint.

for def.

FARMERS' & MERCHANTS' INSURANCE COMPANY v. MOORE.

48 Neb., 713. [1896.]

NORVAL, J. This was an action by O. M. Moore, upon a policy of fire insurance issued by the defendant to one E. C. Warner in the sum of \$330 upon a dwelling house situated in the town of Warnerville, Madison county. The insured property having been subsequently wholly destroyed by fire, this action was commenced to recover the amount of said policy. The cause was tried before a jury and a verdict rendered in favor of the plaintiff. The defendant prosecutes a petition in error.

action on insurance policy.

At the commencement of the trial the defendant objected to the introduction of any testimony, on the ground that the petition failed to state a cause of action, which objection was overruled by the court. This ruling is assigned for error. It is insisted that

the petition fails to show that the plaintiff has any interest in the contract or policy of insurance declared upon. The policy, a copy of which is set out in and made a part of the petition, was executed and delivered to E. C. Warner, the alleged owner of the insured premises. It contained, among other things, the following provisions: "Loss, if any, payable to M. O. Moore, mortgagee, as her interest may appear, subject, however, to all the conditions of this policy." The petition does not disclose that the policy was payable to this plaintiff, Olive M. Moore, or that it has been assigned to her, or that she was in any manner a party to the contract of insurance. The face of the policy shows that the insurance money was to be paid to M. O. Moore. There is no averment in the petition that the initials of plaintiff's maiden name were incorrectly stated in the policy, or that plaintiff and M. O. Moore are one and the same person. The petition is, therefore, faulty in not showing that this plaintiff has a right to recover on the policy. The code requires that actions must be prosecuted in the name of the real party in interest. In order to maintain the suit, plaintiff's interest should have been affirmatively disclosed by proper averments in the petition. *Hicklin v. Bank*, 8 Neb., 463. We are all of the opinion that for the defect indicated above the petition does not state a cause of action in favor of the plaintiff, and for that reason alone, without considering the other errors assigned, the judgment must be reversed, and the cause remanded. Reversed and remanded.

for def

BENNETT v. BENNETT.

65 Neb., 432. [1902.]

By action by Indian set aside conveyance his ward
POUND, C. In June, 1899, Emery W. Tuttle, at that time some 82 years old, conveyed his farm of 160 acres, which was substantially all the property he owned, to his brother-in-law, Ezra Bennett. In November following, Levi Bennett was appointed guardian of said Emery W. Tuttle by the county court of Boyd county, and afterwards brought this suit to set aside the conveyance. A decree was rendered in accordance with the prayer of the petition, from which this appeal is prosecuted.

A considerable portion of the argument on behalf of appellant has been directed to the sufficiency of the petition. In the title,

plaintiff describes himself as "Levi Bennett, Guardian of Emery W. Tuttle," and he does not state anywhere in the petition expressly that he sues as guardian. For this reason, and because the words "guardian of Emery W. Tuttle" might, in strictness, be treated as *descriptio personæ* only, it is urged that this suit is brought by Levi Bennett in his personal, and not in his representative capacity, and is not maintainable. But so long as the plaintiff describes himself as guardian, alleges his appointment as such, and by the allegations of the petition and nature of the action shows clearly an intent to sue in his representative capacity, we may fairly so construe his pleading, notwithstanding his failure to say expressly that he sues as guardian. Williams v. Eikenbary, 36 Neb., 478, 54 N. W., 852.

Plaintiff only describes himself as guardian - make it clear that he is suing as such.

It is further objected that the petition fails to allege that Levi Bennett was duly appointed guardian, and sets up no facts showing that the county court acquired any jurisdiction to make the appointment. The judgment of a court of general jurisdiction is presumed to be regular and valid. Hence in pleading such a judgment it is enough to allege the parties, its rendition and the date thereof, the court by which it was rendered, and, if not a court of whose jurisdiction judicial notice is taken, that it is one of general jurisdiction, without setting forth in detail the facts whereby jurisdiction was acquired in the particular case. Weller v. Dickinson, 93 Cal., 108, 28 Pac., 854; Kunze v. Kunze (Wis.), 68 N. W., 891, 59 Am. St. Rep., 857; Scanlan v. Murphy, 51 Minn., 536, 53 N. W., 799; City of Hammond v. Evans, 23 Ind. App., 501, 55 N. E., 784; Nicholas v. Farwell, 24 Neb., 180, 187, 38 N. W., 820; Holt Co. Bank v. Holt Co., 53 Neb., 827, 74 N. W., 259. Code Civ. Proc., § 127, by its terms, applies only to courts or tribunals of special jurisdiction. Similar provisions in the Codes of other states are so construed. Weller v. Dickinson, *supra*; People v. Bacon, 37 App. Div., 414, 55 N. Y. Supp., 1045. In consequence, it is unnecessary to plead that a judgment was duly recovered, where rendered by a court of general jurisdiction. As to all matters of probate, settlement of estates, and guardianship, the county courts of this state are courts of general jurisdiction. They alone have original jurisdiction over those subjects, and their jurisdiction thereof is general. People v. Gray, 72 Ill., 343; Epping v. Robinson, 21 Fla., 36; Guilford v. Love, 49 Tex., 715; Glade v. White, 42 Neb., 336, 60 N. W., 556. * * *

Rule as to pleading a judgment of another court.

Presume that a judgment is duly recovered

Judgment affirmed.

for plain-

Records are plead generally; not necessary to plead previous prelim-

BERRY v. DOLE.

87 Minn., 471. [1902.]

START, C. J. Appeal by the plaintiff from an order of the district court of the county of Hennepin sustaining a general demurrer to his complaint. The here material allegations of the complaint are to the effect following: That on and for a long time prior to June 29, 1900, the defendants maintained in a public street of the city of Minneapolis a wooden structure or bridge over the gutter therein to facilitate passage of teams and wagons of their tenants and their customers into an alley upon their premises, and invited the public and the plaintiff to use the same; that on that day the wooden structure or bridge was, and for a long time prior thereto had been, in a defective, rotten and unsafe condition, which condition was well known to defendants, although plaintiff had no notice or knowledge thereof; that on that day plaintiff, in the course of his employment as a servant of a customer of one of the defendant's tenants, was lawfully and with due care, and by invitation of the defendants, driving over the bridge, from the alley to the street, a loaded wagon, upon which he was seated, when the bridge suddenly, and without fault of plaintiff, broke down and gave way under the wagon, and thereby caused it to lurch suddenly to one side, and throw plaintiff therefrom, head foremost, violently to the pavement of the street, whereby he sustained serious personal injuries. As against a demurrer, the facts essential to a cause of action must be directly alleged, and not by way of recital, inference, or argument. Tested by this rule, the complaint does not state a cause of action, in that it contains no allegation that the plaintiff was injured by reason of any negligent act on the part of the defendants. It is true that it alleges the disrepair and the unsafe condition of the bridge but it does not allege the fact that it was the defendant's duty to keep it in repair, nor that the bridge broke down and gave way under the wagon by reason of an act or omission of the defendants, or its alleged condition. Such ultimate facts may possibly be inferred from the facts alleged, and probably would be in support of a pleading, if the question of its sufficiency was raised for the first time in this court, or after verdict, but will not be as against a demurrer.

Order affirmed.*

*See also City of Logansport v. Kihm, 159 Ind. 68, holding that a complaint did not sufficiently connect the defective condition of the street with the accident complained of.

Now the defect was in the gut. Def. is entitled to have it is alleged that his negligence caused the injury. How-

HAMILTON v. McINDOO.

81 Minn., 324. [1900.]

COLLINS, J. Action brought by the plaintiff, as an administrator de bonis non of the estate of Russell Search, deceased, upon a judgment rendered in his favor as such administrator in a court of competent jurisdiction in the state of Illinois. On findings of fact, judgment was ordered for the plaintiff, and this appeal is from an order denying the defendant's motion for a new trial.

The question to be met at the outset arises out of the contention that the complaint does not sufficiently allege plaintiff's appointment as administrator de bonis non. The allegations were "that, prior to the proceedings had in obtaining the judgment hereinafter referred to, the above-named Russell Search died in the state of Illinois intestate, and the plaintiff, E. C. Hamilton, had been duly appointed administrator de bonis non" of said estate, had duly qualified, and ever since had been, and now is, such administrator. It is claimed by the plaintiff that it sufficiently appears from these allegations that the plaintiff was appointed administrator in the state of Illinois, while it is contended on behalf of the defendants that it clearly appears from the wording of the allegations, and must be presumed, in the absence of any averment to the contrary, that the appointment was by a competent court within the state of Minnesota. We are not compelled to determine this difference of opinion, for in either case the complaint failed to state facts sufficient to constitute a cause of action. It merely alleged the death of Search and the due appointment of plaintiff as administrator de bonis non. It was said by this court in *Chamberlain v. Tiner*, 31 Minn., 371 (18 N. W., 97), and the authorities are abundant in support of the statement that "it is not now necessary, as it was formerly, to make profert of letters testamentary or of letters of administration in the pleadings; but it is necessary for the plaintiff who sues as executor or administrator to allege in a direct and issuable form that he is such. This properly should be done by alleging that he is executor or administrator by virtue of letters issued by a probate court of some county giving the name of the court and the term at which the letters were granted." No form of words is absolutely essential to show plaintiff's authority, but the fact must appear substantially, so that issue may be made upon the allegation.

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tions, if it is proper to do so. See, also, *Rossman v. Mitchell*, 73 Minn., 198 (75 N. W., 1053), in which the sufficiency of an allegation in a complaint as to the appointment of a plaintiff as a receiver, under the insolvency law of 1881 and acts amendatory, was considered. Again it has been held, with good reasons therefor, that in an action by an administrator de bonis non the complaint should state the name of the original representative, and that, as no such administrator can be appointed while there is an original executor or administrator, there must be an averment that he is dead, or has resigned, or has been discharged, or that his letters have been revoked, as the case may be. 8 Enc. Pl. & Prac., 669.

Plaintiff's counsel contend that their failure to sufficiently allege in the complaint the representative character of their client has been waived, because no demurrer was interposed upon the ground that plaintiff had not legal capacity to sue, or, if a demurrer would not lie, that there has been a waiver, because the question of plaintiff's capacity to sue was not raised by answer. Gen. St. 1894, §§ 5234, 5235. This contention is completely answered by what was said in *Rossman v. Mitchell*, supra, when disposing of a motion for a reargument, in these words: "The complaint in question stated a cause of action in favor of an assignee or receiver of the insolvent, if there was one; but it failed to state facts showing that the plaintiff was such receiver or assignee." The complaint here failed to state a cause of action, and hence an objection on that ground was not waived by failing to take advantage of the defect by demurrer or by answer. The question could be raised by objection to the introduction of the documentary testimony, or by motion to dismiss when plaintiff rested, as it was.

The point is also made by plaintiff's counsel that the action was not brought by their client as administrator, but in his individual capacity, that he had the right to sue as an individual, and therefore that allegations as to his representative capacity were unnecessary; cases being cited in support of this contention. At common law, and to maintain some causes of action, an executor or administrator could sue in either his official or individual capacity, at his option; but whether the present cause of action is of that class we need not decide. When a statute requires, as it does here, that actions must be prosecuted in the name of the real party in interest, suits instituted by an executor or admin-

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istrator upon a cause of action belonging to him in his representative capacity must be brought by him in that capacity (8 Enc. Pl. & Prac., 659, 660), and he is expressly authorized to sue by Gen. St. 1894, § 5158. Order reversed.*

for del.

STATE v. C., M. & ST. P. R. R. CO.

4 S. D., 261. [1893.]

CORSON, J. This was an action by the state to enjoin the defendant from continuing an alleged nuisance. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the same was sustained by the court. From the order sustaining the demurrer, the plaintiff appeals. The defendant specifies as the particular ground of objection, in the brief filed in this court, that there is no allegation in the complaint that the defendant is a corporation. The only indication of the character in which the defendant is sued is in the title. The learned counsel for the respondent contend that the defendant is sued by a name indicating that it is not a natural person, but a company of some kind, and that no facts are stated to show that it is an artificial being, capable of being sued.

It is true that by section 2908, Comp. Laws, it is provided that, "in all civil actions brought by or against a corporation, it shall not be necessary to prove on the trial of the cause, the existence of such corporation, unless the defendant shall, in the answer expressly aver that the plaintiff or defendant is not a corporation." But an allegation that the defendant is a corporation is, we think, still necessary, and the language of the section presupposes that the defendant is sued as a corporation. In what manner can a court be advised that the defendant is sued as a corporation, unless it is so alleged in the complaint? In the recent case of *People v. Central Pac. R. R. Co.*, 83 Cal., 393, 23 Pac., 303 decided in 1890), the supreme court of that state, in passing upon this question, says: "The defendant is sued by a name indicating that it is not a natural person, but a company

*Accord: *State to use of Tapley v. Matson*, 38 Mo. 489. But see *Kelley v. Love*, 35 Ind. 106.

of some kind; but there is no averment of the fact of incorporation, or of any fact to show that it is an artificial being, capable of being sued. Nor, if incorporated, is there any averment to show where, or under what law, so that the court may determine where the jurisdiction of its person lies. An averment of defendant's corporate existence is necessary in every count of a complaint against a corporation. Loup v. Railroad Company, 63 Cal., 99." Mechanics' Banking Ass. v. Spring Valley Shot & Lead Co., 13 How. Pr., 227. Judge Bliss, in his work on Code Pleading, (section 258), says: "But a corporation is an artificial personality, not presumed to exist, even; and the phrase may stand for such personality, or for a joint stock company, or for a partnership, or for a private person, or for nothing at all. The allegation, then, that the plaintiff is a corporation, even if permitted to be made in general terms, would seem to be essential, to show its right to bring the suit." And in section 260, he says: "In regard to actions against corporations, the same general rule should prevail." We are of the opinion that the rule laid down by Judge Bliss and the Supreme Court of California is the safer and better rule, though there are courts holding a contrary rule. In the case of Express Co. v. Harris, 21 N. E. Rep., 340, decided by the Supreme Court of Indiana in 1889, that court says: "The name of the defendant (Adams Express Company) imports that it is a corporation, and it was therefore not necessary to specifically aver that it was a corporation." But, with great respect for that court, we cannot agree with its conclusions. As was said in the California case, the name indicates "that it is not a natural person but a company of some kind" but whether a corporation, or an unincorporated association, does not appear. We are not aware of any principle of law that will authorize a court to presume that it is a corporation, any more than it would presume that it was an unincorporated association. A similar view as to the necessity of alleging in the complaint that the defendant is a corporation was taken by the Supreme Court of North Carolina in Stanley v. Railroad Company, 89 N. C., 331.

The learned attorney general further contends that the defect, if it exists, cannot be reached by a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. But we are of the opinion that, under the provisions of our code, the objection can only be made under such a demurrer. It cannot be raised under any of the other grounds

of demurrer specified in section 4909, Comp. Laws. The attorney general cites in support of his contention Insurance Co. v. Baldwin, 37 N. Y., 651, and Bank v. Donnell, 40 N. Y., 410. These were both cases in which the alleged corporation was the plaintiff. In the latter case, two of the judges dissented. Judge Bliss, in commenting on these decisions, in a note to section 258, says: "If evidence of incorporation is necessary, it is a part of the plaintiff's case. He is only bound to prove the facts constituting his cause of action; and, if any such fact is omitted in the pleading, it should be demurrable for that reason." While under section 2908, Comp. Laws, the party is relieved from proving the fact of incorporation, unless it is expressly averred that the plaintiff or the defendant is not a corporation, the rule as to pleading the incorporation is not changed, and the omission of this allegation renders the complaint subject to demurrer. We are of the opinion, therefore, that the learned Circuit Court properly sustained the demurrer of the defendant, and the order sustaining the demurrer is therefor affirmed. All the judges concur.

for def.

HOLDEN v. GREAT WESTERN ELEVATOR COMPANY.

69 Minn., 527. [1897.]

MITCHELL, J. This action was brought to recover damages for the wrongful conversion of the personal property of the plaintiff by the defendant. The title of the action was "Holden, Plaintiff, against Great Western Elevator Company, a Corporation," but there was no allegation in the complaint that the defendant was a corporation. The defendant appeared by the name by which it was sued, and demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. From an order overruling the demurrer, the defendant appealed.

The particular objection urged against the complaint is that it contained no allegation that the defendant was a corporation. We have, then, the anomaly of the defendant appearing by the name by which it is sued, thereby admitting that it is an entity of some kind capable of appearing as a party to an action, and objecting to the complaint because it does not state what kind

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of an entity it is. And even if it is necessary, in an action against a corporation, to allege its corporate existence, it would seem to be illogical to hold that the omission to do so could be taken advantage of by general demurrer. But, waiving this question, we are of opinion that in an action by or against a corporation it is unnecessary to aver the incorporation, except in cases where the action, in its gist or substance, involves the fact of corporate existence, in which case, of course, it would have to be alleged the same as any other fact constituting the cause of action. The decisions on this question are conflicting, sometimes so in the same jurisdiction. Our own decisions are not entirely free from this criticism. But, in our judgment, the doctrine just stated is sound on principle, and supported by the weight of authority. No averment of incorporation was required at common law,* and we have no statute requiring it. When an action is brought by or against a corporation, there is no more reason, in the nature of things, why it should be necessary to allege that it is an artificial person, than there is in an action by or against a natural person to allege that he is such. It is not a fact which enters into or constitutes any part of the cause of action. We strongly intimated in *Howland v. Jeuel*, 55 Minn., 102, 56 N. W., 581, that such were our views of the law, which are in accord with those expressed by Mr. Freeman in his notes to *Harris v. Manufacturing Company*, 29 Am. Dec., 375, and to *Miller v. Mining Company (Idaho)*, 35 Am. St. Rep., 291 (s. c. 31 Pac., 803), in which we fully concur. Order affirmed.

for plain.

CONSIDINE v. GALLAGHER.

31 Wash., 669. [1903.]

FULLERTON, C. J. The respondent, Considine, entered into a contract with the defendant Gallagher by the terms of which the defendant undertook to furnish all of the necessary materials

*In *Wolf v. City Steamboat Company*, 7 Common Bench Reports, 103 [1849], in ruling on a similar demurrer, Justice Maule said:

"There is no positive rule that I am aware of which requires such a mode of description as the defendants' counsel insists upon in this case; nor is the description which is given at all out of the usual form; it *impliedly* amounts to an allegation that the defendants are a corporate body."

and construct for the respondent a dwelling house according to certain plans and specifications agreed upon between the parties for a fixed consideration. To secure the faithful performance of the work, the defendant entered into a bond, with the appellant as surety, in the sum of \$2,000, conditioned that he would carry out the contract. The defendant thereafter entered upon the prosecution of the work, and partially completed the same, finally abandoning it before completion. The respondent thereupon, after notifying the surety to complete it, and after its refusal to do so, completed the building himself at a cost exceeding the original contract price by more than the amount of the bond. He brought this action upon the bond to recover for the loss to the amount of the penalty named in the bond.

action on a surety's bond, given a week later than the contract guaranteed

A demurrer was interposed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and overruled by the trial court, which ruling constitutes the first error assigned. The complaint averred that the building contract was entered into on the 12th day of December, 1900, while the bond as set out in the complaint bore date as of the 19th day of December, 1900. The contention is that the bond was executed so long subsequent to the original contract that it cannot be presumed to be a part of the same transaction, or supported by the original consideration, and for that reason it was necessary that it be alleged that the bond was made upon sufficient consideration, in order to state a cause of action upon it. The general rule in regard to guaranty is that, if the guaranty and contract guaranteed are a part of the same transaction, the consideration for the latter supports the former; while, if they are not one transaction, the bond must be supported by a consideration independent of the consideration for the original contract. But this rule does not aid the appellant here. It is a rule of pleading, and not a rule of evidence, that he is contending for. Hence, if the complaint in any form contains an allegation of consideration for the bond, or contains an allegation of fact from which consideration is implied, it is sufficient. Here the complaint, at least, does the later. The bond is set out in full therein, even as to the manner of its execution, showing it to have been an instrument under seal; and the rule of the common law is—and it has not been changed in this state—that a contract under seal imports a con-

Def. contends plain. sh. have albg considered in the bo

Rule of guaranty

Here plain shows bond to have been under seal and this imports consideration / none necessary

sideration.* In such a case want of consideration, if available at all, is a matter of defense. 6 Am. & Eng. Enc. of Law (2d Ed.) pp. 762, 763.

The other errors assigned are based upon the sufficiency of the evidence to support the findings of fact, but, as no exceptions to the findings were taken, they cannot be considered.

The judgment appealed from is affirmed.

for plain.

TOOKER v. ARNOUX.

76 N. Y., 397. [1879.]

Appeal from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, affirming a judgment in favor of plaintiff, entered upon a verdict.

The facts alleged in the complaint were as follows:

“First.—That on or about the 25th day of July, 1872, at the city of New York, James Watson made and delivered to the plaintiff for value his certain draft or order, in the words and figures following:

“New York, July 25, 1872.

“William Henry Arnoux:

“Dear Sir—Please pay to William T. Tooker the sum of five hundred and fifty-six (556) dollars, out of the money to be realized from the sale of the houses on the north side of 46th street, City of New York, and known as Nos. 305, 307 and 309, East 46th street.

“JAMES WATSON.”

“Second.—That thereafter, and on or about said day, the plaintiff presented said draft or order to said Arnoux, who thereupon for value duly accepted the same.”

*It has been often said that a seal imports a consideration, as if a consideration were as essential in contracts by specialty as it is in the case of parol promises. But it is hardly necessary to point out the fallacy of this view. It is now generally agreed that the specialty obligation, like the Roman *stipulatio*, owes its validity to the mere fact of its formal execution.”

Ames, Specialty Contracts and Equitable Defenses, 9 Harvard Law Rev. 49.

“Third.—That on the 6th day of August, 1872, said Arnoux paid on account thereof one hundred dollars, and there is now due on said draft or order, from the defendant, the sum of four hundred and fifty-six dollars, with interest from said 25th day of July, 1872.”

And judgment was asked for that amount.

The answer admitted the acceptance of the order, the payment of \$100, but denied that there was any money realized from the sale of the houses, or that there was due plaintiff the sum claimed.

At the beginning of the trial, defendant's counsel moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The motion was denied, and said counsel duly excepted. Plaintiff offered evidence of the sale of the houses specified in the order. This was objected to by defendant's counsel on the ground that this was not averred in the complaint. No application was made for an amendment of the complaint.

The court directed a verdict for plaintiff, which was rendered accordingly.

RAPALLO, J. At the opening of the trial the defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The motion was denied and exception taken. The reason assigned was that the defendant should have demurred.

This position is in conflict with section 148 of the Code and with many decisions of this court. If the complaint was bad in substance the objection was available on the trial and the motion to dismiss should have been granted. (*Schofield v. Whitelegge*, 49 N. Y., 259; *Coffin v. Reynolds*, 37 id., 640; *Emery v. Pease*, 20 id., 62.)

We think the complaint was clearly bad. The sale of the houses mentioned in the order and the receipt of money from such sale were conditions precedent to the defendant's liability on his acceptance, and those facts should have been averred. In the absence of such averments no indebtedness on his part to the plaintiff appeared. (*Munger v. Shannon*, 61 N. Y., 251, 260.)

The denial in the answer of the receipt of any such moneys did not supplement the complaint in this respect. In *Bate v. Graham* (11 N. Y., 237) the answer contained an affirmative allegation of the fact which the complaint should have averred, but in *Scho-*

field v. Whitelegge, as in the present case the answer contained a denial of the essential fact, and it was held that such denial did not cure the defect in the complaint.

The complaint in the present case cannot be sustained by virtue of section 162 of the Code, which provided that in an action upon an instrument for the payment of money only, it should be sufficient to set forth a copy of the instrument and allege the amount due thereon. It was decided by this court in Conkling v. Gandall (1 Keyes, 231), that section 162 was not applicable where the liability of the defendant was conditional, and depended upon facts outside of the instrument; that in such a case the facts must be averred.

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The objection to the complaint was not waived upon the trial. The defendant not only took the objection of the insufficiency of the complaint before any evidence was taken, but when the plaintiff offered evidence of the fact that the houses had been sold, he objected to such evidence on the ground that the fact had not been alleged in pleading.

We see no ground upon which this case can be distinguished from the numerous cases in which it has been decided that a party may upon the trial lawfully demand a dismissal of the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The court below at General Term conceded that if the trial judge had granted the motion to dismiss it would have been bound to sustain his action. The necessary consequence of this concession is that in denying the motion the trial judge erred. It was not a question of discretion, but of legal right, whether the complaint should be dismissed, and if it would not have been error to grant the motion, it was error to deny it. It is true that an amendment of the complaint might have been allowed in the court below, but no amendment was made or asked for, and the objection to the complaint having been taken in due season and overruled, the correctness of the ruling must be tested by the complaint as it stood, and not as it might have been changed by amendment.

The judgment must be reversed and a new trial ordered, costs to abide the event.

for def

BANK V. GERMAN AMERICAN INSURANCE COMPANY.

72 Wis., 535. [1888.]

CASSODAY, J. 1. It is claimed that the complaint fails to show that any premium was ever paid or agreed to be paid for the policy, and hence that there is no sufficient consideration alleged to support the contract. It is alleged "that on the said day the defendant, for a valuable consideration, entered into a contract of insurance with the said Rossell, by the terms of which contract, said defendant insured said Rossell, for the term of one year from said date, against loss or damage to said property by fire, to the amount of \$1800." From this it appears that the contract alleged was based upon "a valuable consideration." This would seem to be enough to support the undertaking to insure. It is said that it expresses "a mere opinion of the pleader, and is not a statement of the facts." But we think that it does allege, as a fact, that the consideration for the contract was valuable. Whether the allegation is too general, or not sufficiently definite and certain, cannot be raised on demurrer, but only by motion. Section 2683, Rev. St.

2. It is alleged "that on or about Sept. 7, 1887, the hotel building above described was totally destroyed by fire." It is said that this is insufficient by reason of the failure to allege "that the fire was the result of accident or misfortune, and not through any fraud or evil practice on the part of the assured." } *objection*
The law does not seem to require the negation of such conditions subsequent. Redman v. Insurance Co., 49 Wis., 431, 4 N. W. Rep., 591. Besides, there is nothing in the complaint indicating that the contract of insurance contained any such exception, warranty or condition. It simply alleges an absolute undertaking to insure. Upon this demurrer we are not at liberty to assume that the contract is different than alleged, because such contracts usually contain numerous exceptions, warranties, and conditions. The question of variance is not here involved. There is certainly no good reason for alleging such negatives in a complaint upon such absolute undertaking to insure. } *If this was not the contract def. made, he cannot reach it by demurrer.*

3. It is said that there is an absence of any allegation, that any proofs of loss were ever received by the defendant. The allegations of the complaint in this regard are that "it was further agreed by said parties, by said contract of insurance, that

the amount of any loss or damage by fire to the property insured should be paid by defendant sixty days after due notice and proof of loss had been made by said Rossell, and received by the defendant; and plaintiff further shows that after the destruction of said building by fire, and more than sixty days prior to the commencement of this action, the said Rossell fully complied with all the conditions of said contract, and rendered to said defendant a particular account and proof of loss, as required by said contract." This would seem to be sufficient. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but only to state generally that the party duly performed all the conditions on his part. Section 2674, Rev. St.; Schobacher v. Insurance Company, 59 Wis., 89, 17 N. W., 969; Reif v. Paige, 55 Wis., 502, 13 N. W., 473; Boardman v. Insurance Co., 54 Wis., 365, 11 N. W., 417.

4. It is said that the complaint is insufficient in failing to allege that the assignment by Rossell of his claim for the loss, under the contract of insurance, to the plaintiff, the next day after the fire, was in writing, and hence not within the statute of frauds. Section 2308, Rev. St. True, this section declares, in effect, that "every contract for the sale of any * * * things in action, for the price of fifty dollars or more, shall be void, unless" (1) it be in writing; "or (2) unless the buyer shall accept and receive part * * * of such things in action; or (3) unless the buyer shall, at the time, pay some part of the purchase money." The allegations of the complaint are: "That on or about the 8th day of September, A. D., 1887, the said Frank Rossell, for a valuable consideration, duly sold, assigned and transferred to this plaintiff all his claim and demand against the said insurance company, defendant, accruing to him by virtue of the said contract on account of said loss; and the plaintiff ever since has been and now is the owner of the said claim and demand." Whether the words "for a valuable consideration," here used, are sufficient to indicate payment of the consideration "at the time" of the assignment, within the meaning of the last clause of the section quoted, we deem it unnecessary here to determine; for we are clearly of the opinion that the words, "duly sold, assigned, and transferred to this plaintiff," with what follows, in effect allege that the contract of insurance, with the amount due thereon, was on the day named delivered to and

accepted by the plaintiff as buyer, under the second subdivision of that section. A parol "contract for the sale * * * of such things in action," accompanied by a delivery to and acceptance by such buyer, takes the case out of the operation of the section, and is binding upon the parties. *Anson v. Dreher*, 35 Wis., 615; *Mason v. Whitbeck Co.*, id., 164; *McKnight v. Dunlop*, 5 N. Y., 537, 55 Am. Dec., 370, and cases cited in the notes.

5. Besides, in pleading an assignment required to be in writing, it is sufficient to aver that such assignment was made, as this will be held, on demurrer, to imply a valid assignment under the statutes. *Robbins v. Deverill*, 20 Wis., 142. The order of the Circuit Court is affirmed.

for plan. ✓

✓ JONES v. ACCIDENT ASSOCIATION.

92 Ia., 652. [1894.]

KINNE, J. 1. April 8, 1891, the defendant company issued its policy of insurance upon the life of one W. M. Jones, in the sum of \$5,000, against "personal bodily injuries, effected during the continuance of membership and this insurance, through external, violent and accidental means." Among the conditions of the said policy were the following: "The insurance under this contract shall not extend to or cover * * * accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by * * * fighting; * * * or voluntary exposure to unnecessary danger; nor extend to or cover accidental injuries or death happening while the insured is under the influence of intoxicating drinks, or in consequence thereof; or while or in consequence of violating the law." And also: "The provisions and conditions aforesaid, and a strict compliance therewith during the continuance of this contract, are conditions precedent to the issuance hereof, and to its validity and enforcement." The application upon which the policy was based contained the following statement: "(3) My habits of life are correct and temperate, and I agree that the certificate of membership shall not cover any injury which may happen to be while under the influence of intoxicating drinks or narcotics, or in consequence of having been under the influence thereof." The policy was made payable to plaintiff. The petition charges

"that on or about the 31st day of May, 1892, at Council Bluffs, Iowa, and whilst the said policy of insurance was in full force and effect, and without any fault or negligence on the part of the assured, he, the said W. M. Jones, was mortally wounded by a pistol ball fired by one John Wade, and that he died as a result thereof." It is also averred that proper proofs of death were sent to and received by the company in due time. * * *

3. At the close of the testimony, defendant filed a motion in arrest of judgment, claiming that the petition did not state a cause of action, in that it failed to aver that none of the conditions upon which the policy was issued were "breached" by the assured. This motion was overruled and an exception taken. Defendant's contention is that it was only to be liable in the case of death of the assured in the absence of certain conditions stated in the policy, and that it was incumbent upon the plaintiff to negative these exceptions in his petition. The question then is, must these conditions or exceptions, the existence of which may relieve the defendant from liability, be pleaded by plaintiff, or are they so far matters of defense as that the burden is upon the defendant to plead and prove them? In our judgment, they were not required to be pleaded or proven by plaintiff. They were purely matters to be relied upon in defense of an action on the policy. Defendant insured Jones, "subject to the by-laws and all the conditions indorsed hereon (on the policy) against personal bodily injuries effected during the continuance of membership and this insurance, through external, violent, and accidental means." On this policy it is said: "The conditions under which this certificate was issued and accepted by the assured are as follows: Then follow the several provisions that the contract shall not extend to or cover certain cases, theretofore mentioned. At the end of these conditions it is said "The provisions and conditions aforesaid, and a strict compliance therewith during the continuance of this contract, are conditions precedent to the issuance hereof, and its validity and enforcement." It ought to be said that the fact that the contract says that certain provisions of it shall be conditions precedent does not, of necessity, make them such. We cannot accede to the doctrine that the provisions under consideration are conditions precedent. A condition precedent, as applied to the contract, is a condition which must be performed before the agreement of the parties becomes a valid contract. Redman v. Insurance Company, 4 N. W., 595,

In pleading an exception, def. is saying that he never broke the contract sued on.

In excuse, he admits the contract and the breach and attempts to legally justify it.

49 Wis., 431. The conditions in this case were that the contract should not cover accidental death resulting from or caused by fighting, voluntary exposure to unnecessary danger, intoxication, or to death in consequence thereof, and in consequence of violating the law. Not one of these conditions were to happen prior to the time the contract between the assured and the company should become binding. The contract became binding upon the company as soon as it accepted the assured as a member, and issued to him its policy. The situation then is this: That there was a valid contract of insurance when the policy issued, but it might thereafter, upon the happening of some of these conditions, cease to be enforceable. If, then, these provisions of the policy can be properly called conditions, they are in no sense conditions precedent. Under them the defendant might be relieved from liability. They were each and all matters of defense, available to the defendant; but, not constituting a part of the plaintiff's case, the burden did not rest upon him to either plead or prove them in the first instance. *Redman v. Insurance Co., supra*; *Coburn v. Insurance Co.*, 145 Mass., 226, 13 N. E., 604; *Freeman v. Insurance Co.*, 144 Mass., 572, 12 N. E., 372; *Insurance Co. v. Nichols* (Tex. Civ. App.), 24, S. W., 910; *Badenfeld v. Association* (Mass.), 27 N. E., 770; *Insurance Co. v. Ewing*, 92 U. S., 377; *Cronkhite v. Insurance Co.* (Wis.), 43 N. W., 731; *Newman v. Association*, 76 Iowa, 63, 40 N. W., 87; *Sutherland v. Insurance Co.* (Iowa), 54 N. W., 453. The motion in arrest was properly overruled. * * *

(Judgment reversed on other grounds.)

for plain.

Here the question arose as to motion in arrest and all the the court is dictum since on den when the complaint was have been ge But on gen al denial, s would have won, since he could be objected to introducing the contract evidence.

STROEBE v. FEHL.

22 Wis., 337. [1867.]

Action by the vendee of growing timber to restrain interference by the grantee of the land. The facts sufficiently appear in the opinion.

DIXON, C. J. The title of the husband, the plaintiff's vendor, is not accurately pleaded, and, by the strict rules of the common law, the complaint in this particular would doubtless be bad. It may be so now; but the objection should be taken by demurrer, or motion to make the complaint more definite and certain. The

avermment is, "that from the 21st day of August, A. D., 1845, till the 22d day of February, A. D., 1866, one Nelson Burst was seized, in right of his wife, Eliza Burst, of the east half, etc." At common law the husband acquires by the marriage a free hold estate in the lands of the wife, but not the fee, which still remains in the wife. Both together have the whole estate, and therefore in law they are considered as seized in fee, and must so state their title in pleading. The husband cannot aver, in pleading, that he alone is seized in fee in right of his wife, because the fee is in the wife, and of this he is seized jointly with her. Melvin v. Proprietors of Locks, etc., 16 Pick., 165. But though this is so, we think the defect is not one which can be taken advantage of by objecting to evidence at trial. The intention of the pleader to aver a seizin of the husband by virtue of the marriage, which in law constitutes a joint seizin of the husband and wife, and should be so pleaded, is very plain; and, as the opposite party cannot be taken by surprise, the court, instead of rejecting the evidence, should, under the liberal powers of amendment now conferred by statute, rather order an immediate amendment of the complaint, or receive the evidence and allow the complaint to be afterwards amended so as to conform to it.

The next objection is, that the complaint is defective in not averring that Nelson Burst and his wife are still alive, or, if the wife be dead, that the husband survives and has become tenant by the curtesy. The reason of this objection is, that as the estate of the husband in the land of the wife is an estate for their joint lives only, unless the husband survives the wife under such circumstances as to become a tenant by curtesy, and then only for his life, and as all interest in or title to the estate acquired under the husband ceases absolutely upon the determination of his estate, the complaint shows no cause of action, except it appears that the husband still lives and is tenant by the curtesy.

There are two answer to this objection, either of which is sufficient. The first is, that, it appearing that the husband and wife were alive on the 22d day of February, 1866, the presumption is that they are still living, until the contrary is shown by the party who asserts the death. 1 Greenleaf on Ev., sec. 41. When the law presumes a fact, it need not be stated in pleading. 1 Chitty's Pl., 231.

The other answer is, that the determination of the husband's

These questions arose in the inducement, which is more liberally construed than the gist. When once a person is alleged to be alive, the pleader implies that

estate, by the death either of himself or his wife, is a matter in
defeasance of the action, and need not be pleaded. It is a con-
dition subsequent to the estate of the husband, and in its nature
a matter of defense, which ought to be shown in pleading by the
 opposite party. 1 Chitty's Pl., 33. * * *

By the Court. Judgment reversed and new trial awarded.

_____ for plaintiff.

*Not necessary
to allege the
husband's
estate has not
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dition sub-
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MOXLEY'S ADMINISTRATORS v. MOXLEY.

2 Met. (Ky.), 309. [1859.]

Judge DUVALL delivered the opinion of the Court:

The only question we shall deem it important to consider, as the case is now presented, is that which arises on the demurrer to the amended petition.

In that amendment it is alleged, in substance, that on the — day of —, 1851, the testator, in his lifetime, proposed to plaintiff that if he, the plaintiff, would quit his business and trade of carpenter, and undertaker of carpenter's work, and come and live with the testator on his farm, that he would do as well or better for the plaintiff than the plaintiff was doing or could, by his said trade of carpenter.

That the plaintiff, confiding in the promises so made, did, on the — day of —, 1851, quit his said trade, and go to the farm of the testator in his lifetime, and live with and aid and assist said testator in his business, from the — day of —, 1851, until the death of the testator in 1855.

And the plaintiff avers that his business and trade of carpenter, etc., was worth \$1,200 per year, of which the testator and his representatives had notice. "Yet said testator in his lifetime, nor said administrators with the will annexed, since the death of said testator, hath or have paid *plaintiff any part of the said sum of money,*" although often requested, etc.

To the sufficiency of this pleading two objections are urged by the appellants:

1. That it sets out no valid contract between the parties, upon which the plaintiff was entitled to recover; and,

2. That it fails to assign a sufficient breach of the contract as alleged.

1. A proposition or offer imposes no obligation on the party

making it, unless it be accepted by the party to whom it is made. But this is not all. The acceptance must be within a reasonable time. And the question what is or is not a reasonable time, must be determined by the nature of the case. "It may be said," says Parsons, "that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. If the proposer fixes a time, he expresses his intention, and the other party knows precisely what it is. If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose that the parties contemplated; and the law will decide this to be that time which, as rational men, they ought to have understood each other to have in mind."

Tested by these principles, it is clear that the facts alleged in the amended petition do not, of themselves, import an agreement, or authorize the legal deduction that any contract of the character here sought to be enforced, existed between the parties at the time of the death of the testator. The plaintiff does not allege, in terms or in substance, that he accepted the proposition within a reasonable time after it was made. Nor are the dates so stated as to enable the court to infer, by the most liberal intendment, that the acceptance was within a reasonable time. He avers that the offer was made on the — day of —, 1851, and that he, confiding in the promises of the testator, did, on the — day of —, 1851, quit his trade, etc. It is obvious that, in cases of this kind, time becomes an essential element to be considered in determining the legal effect of the alleged acceptance. This proposition, so far as any thing to the contrary appears in the pleading, may have been made in the beginning of the year 1851, and the acceptance of it may have been made at the end of that year. If so, could it be said, in view of the circumstances of the parties, or of the nature and subject-matter of the negotiation, that the acceptance was within a reasonable time, or, in the language of the authority quoted, is it rational to suppose that the parties, or either of them, could have contemplated such a lapse of time between the making of such offer on the one hand, and its acceptance on the other? We think not. And our conclusion is, that upon this ground the demurrer to the amended petition should have been sustained. There can be no doubt that the plaintiff might have shown, by suitable averment, that the testator had, by his acts, waived the effect of the plaintiff's failure to

accept the proposition within a reasonable time. But the amended petition contains no averment that can be so construed.

2. The second objection is still more manifestly fatal.

The breach of a contract is an essential part of the cause of action, and the assignment of the breach must, in all cases, be governed by the nature of the stipulation.

The breach should be assigned in the words of the contract, either negatively or affirmatively, or in words which are co-extensive with the import and effect of it. (Chitty's Pleadings, 332.)

If the breach vary from the sense and substance of the contract, and be either more limited or larger than the covenant, it will be insufficient. (Ibid., 334.)

In the case of *Ilford v. Trimble* (3 Marsh., 532), this court laid down the rule that, to make the breach in covenant good, it is not necessary that it should be assigned in the words of the covenant. "But the expressions must be of the like import or rather, such words must be used as show that they cannot be true unless the covenant is broken." Other and later cases to the same effect might be quoted, if it were necessary.

But the rules of pleading which require that the contract itself shall be substantially set out, as well as the breach of which the plaintiff complains, are fundamental, and must be too well understood to require either illustration or authority, at this day. And it is a great mistake to suppose that those rules have been either abrogated or essentially modified by any of the provisions of the Civil Code.

Is it not apparent, then, that the breach of the contract attempted to be assigned in the pleading under consideration, is altogether insufficient? The substance of the alleged agreement is, that the plaintiff should quit his business and trade of carpenter, and should come and live with the testator on his farm, and the latter *would do as well or better* for the plaintiff than the plaintiff was doing or could do by his said trade; and the breach assigned is, that the testator and his representatives had failed to pay to the plaintiff any part of the sum of \$1,200 per year, that being the annual value of the plaintiff's trade and business. Now it can hardly be argued that the words of this breach are co-extensive with the import and effect of the contract, the only stipulation of which, on the part of the testator, was not to pay to the plaintiff in money a sum equal to what his trade was worth per year, but to do as well or better for the plaintiff than he was

Breach varies in sense substance of contract
Breach corresponds with the promise which I have made to compensate in the way of board clothing. Plaintiff has placed a condition on it called for

doing or could do by his trade and business. Could this undertaking of the testator, to do as well or better for the plaintiff than he was doing or could do at his trade, be discharged in no other way than by payment in money of what the trade was worth?

The breach, then, as assigned, varies from the sense and substance of the contract. It is more limited than the contract in its import and effect. The words of the breach may be true, and yet the word of the testator may stand unbroken. He may have failed to pay the plaintiff the sum of money mentioned, "or any part thereof," and yet, through an almost inconceivable number of other channels, he may have bestowed benefits upon the plaintiff almost inconceivable in number and value, and may thus have redeemed his promise to do better for the plaintiff than the latter was doing or could do by his trade.

It results that the court erred in overruling the demurrer to the amended petition.

The judgment is therefore reversed, and the cause remanded, with directions to sustain the demurrer, giving to the plaintiff leave to further amend his petition, if he desires to do so, and for a new trial and further proceeding not inconsistent with this opinion.

for def.

LENT v. N. Y. & M. R. R. CO.

130 N. Y., 504. [1892.]

'Action to recover the amount awarded to plaintiff in condemnation proceedings. The complaint alleges the various proceedings resulting in the award, but did not allege non-payment.*

BROWN, J. * * * It remains to consider the question whether, giving to the word "entered" the interpretation that we have, the complaint states a cause of action. The effect of the recording of the order was to create a debt against the defendant, and in that respect its liability is analogous to a liability arising upon the maturity of a contract for the payment of money, and the question is presented whether an allegation of non-payment is essential and material to the cause of action. The code (section 481), provides that the complaint must con-

*The statement has been abridged, and a part of the opinion omitted.

tain a plain and concise statement of the facts constituting the cause of action, and the general rule deduced therefrom is that whatever facts are essential to be proven to entitle the plaintiff to recover upon the trial must be alleged in the complaint. It does not admit of controversy that, upon an ordinary contract for the payment of money, non-payment is a fact which constitutes the breach of the contract, and is the essence of the cause of action, and, being such, within the rule of the code it should be alleged in the complaint. It is said, however, that payment is always an affirmative defense, which must be pleaded to be available, and hence non-payment need not be alleged, as it is not a fact put in issue by a general denial. *Salisbury v. Stinson*, 10 Hun, 242. The rule that payment is an affirmative defense is not one embodied in the code, but had its origin under the common law practice in the plea of non-assumpsit; and the reason for it was that in assumpsit the allegation in the declaration and the traverse in the plea were in the past tense, and, under the rule which excluded all proof not strictly within the issue, no evidence was admissible, except such as had a tendency to show that the defendant never had made the promise. It was never applied in the action of debt,* the allegation in that form of action being in the present tense, and, under the plea of nil debet, any fact tending to show that there was no indebtedness on the part of the defendant was admissible. The history of the rule is set forth in Judge Seldon's opinion in *McKyring v. Bull*, 16 N. Y., 297, and need not be referred to here. Following the rule thus established under the former practice, the courts have uniformly held, since the adoption of the code, that payment must be pleaded, and cannot be proven under the general issue. While the effect of these decisions is to modify somewhat the rule embodied in section 500 of the code, their tendency is to simplify pleading, as under their application the plaintiff is informed of the precise defense intended to be made, and thus unnecessary preparation is obviated, and surprise on the trial avoided.

But there is no need to further extend the rule, and hold that, because payment as a defense must be pleaded, the breach of the agreement need not be alleged in the complaint. That would have the contrary effect, and lead to embarrassments that are avoided when the plain provisions of the code are followed. No authority exists, so far as I am able to find, except the case of *Salisbury v.*

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*But see *Goodchild v. Pledge*, 1 M. & W. 363.

at common law, non payment had to be alleged, in suing on failure to pay money. Also, non-payment could not be brought up under non-assumpsit. But must

Stinson, holding that a breach of the contract need not be pleaded, but all text writers and reported cases hold to the contrary. 1 Chitty Pl. & Pr., pp. 325-359; Com. Dig. tit. "Pleader," C, 44; 2 Wait, Law & Pr., p. 318; 1 Wait Act. & Def., pp. 394, 395, and cases cited; Witherhead v. Allen, 4 Abb. Dec., 628; Tracy v. Tracy (Sup.), 12 N. Y. Supp. 665; Van Gieson v. Van Gieson, 10 N. Y., 316; Krower v. Reynolds, 99 N. Y., 245, 1 N. E., 775. Witherhead v. Allen, arose upon a demurrer to a complaint. The opinion states the rule as follows: "When the action is founded upon the contract obligation or duty of the defendant, the very gist and essence of the cause of action is the breach thereof by the defendant, and, unless a breach is alleged, no cause of action is shown." In Van Gieson v. Gieson, 10 N. Y., 316, it is said: "The material allegations of the complaint in this case are the making by the defendants of the promissory note, the transfer of it to the plaintiff, and the non-payment by the defendants. Each of them is material, for without the concurrence of all of them the complaint would not show a cause of action." To the same effect is Keteltas v. Myers, 19 N. Y., 231. See, also, Code, § 534, 1213, subd., 2. In Krower v. Reynolds it was held, in an action on a covenant to pay a mortgage, that it was necessary to allege that the mortgage had not been paid, or that the defendant had failed to perform his covenant, and without such allegation the complaint was demurrable. And in numerous cases, which need not be cited, but of which Allen v. Patterson, 7 N. Y., 476, is a type, the rule is recognized by implication, but the complaints were held good because of an allegation of indebtedness by the defendant to the plaintiff. This rule is further recognized in section 534 of the code, which provides a simple form of pleading on an instrument for the payment of money only, but requires the plaintiff to state the sum which he claims to be due to him thereon. Again, the complaint, when verified, and there is no answer, stands as proof of the plaintiff's claim, and the clerk is authorized to enter judgment thereon.

But if the plaintiff is not required to allege a breach of the contract or state the amount due, as his verification would cover only the facts alleged, the clerk, under sections 420, 1212, 1213, of the code, would be authorized to enter judgment for the whole amount called for by the contract, and this without proof of the amount due thereon. This would be contrary to the whole spirit of the code, and would require the clerk to presume a fact neither

alleged nor proved, viz., that no payments had been made. These views show how essential to the practice it is that the plaintiff should allege the breach of the contract of which he complains. That breach is always a fact, and it is of the very essence of the cause of action. The complaint should show facts which, if verified and not denied, prove to the clerk that the plaintiff is entitled to the judgment which he demands. It cannot be said that where the breach consists in non-payment of an agreed sum, it is not an issuable fact, because payment cannot be proven under general denial. The most that can be said is that that form of denial does not put that fact in issue, and to that extent the rule that payment must be pleaded must be deemed to modify the rule of pleading under the code in reference to a general denial. But no reason is apparent how it can justify the omission from the complaint of a fact material to the plaintiff's cause of action, and essential to be proved to entitle the plaintiff to a judgment. Such facts, under the code, must be pleaded. No presumption can be indulged in that a defendant has failed in his duty or omitted to perform his contract obligation. There was no allegation in the complaint in this action that the defendant had failed or omitted to pay the award, and no allegation of indebtedness, and without such no cause of action was stated. On this ground we are of the opinion that the demurrer was well taken. Other objections to the complaint were discussed upon the argument, but none of them are considered well taken. The judgment must be reversed, and the demurrer sustained, with costs, with leave to the plaintiffs to amend the complaint within thirty days on payment of costs. All concur, except FOLLETT, C. J., and VANN, J., dissenting, and POTTER, J., not voting.

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JONES v. EWING.

22 Minn., 157. [1875.]

Defendant mortgaged certain real estate to plaintiff. The mortgage contained the usual power of sale, and, upon default in payment, was foreclosed by advertisement, the plaintiff becoming the purchaser. After the expiration of the year of redemption plaintiff brought this action for unlawful detainer, under Gen. St. ch., 84, to recover possession of the premises so mort-

gaged and sold to him. The justice rendered judgment for plaintiff, from which defendant appealed. The appeal was heard in the district court for Hennepin county, Vanderburgh, J., presiding, and judgment rendered for defendant on the pleadings, from which the plaintiff appeals. The objection to the complaint is that in setting out plaintiff's title it fails to state that no action had been brought, before the foreclosure, to recover the mortgage debt, etc.

CORNELL, J. To entitle any party to give notice of the foreclosure of a real estate mortgage by advertisement, and to make such foreclosure, the statute declares that "it is requisite" among other things, "that no action or proceeding has been instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof; or, if the action or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied, in whole or in part." Gen. St. ch., 81, § 2.

question
In setting up a title acquired under such foreclosure, is it necessary, in addition to the other essential facts showing a right to give the notice and make the foreclosure, that the pleading contain an averment that no action or proceeding has been instituted at law to recover the debt secured by the mortgage, or any part thereof; or, if instituted, that the same has been discontinued;? or, that an execution, etc., has been returned unsatisfied, in whole or in part? This is a question of pleading, and must be determined by the rules of pleading. If a complaint contain a distinct statement of all the facts which, upon a general denial, the plaintiff will be bound to prove, in the first instance, to protect himself from a nonsuit, and to show himself entitled to a judgment, it is good pleading. It is sufficient if it shows a prima facie right in the plaintiff to recover, and it is not necessary that it should negative a possible defense (Moak's Van Santvoord, 163; Doughty v. Devlin, 1 E. D. Smith, 625, 631), or state matter which would come more properly from the other side. Stephen Pl., 350. These are general and elementary rules of pleading, applicable as well under the code as under the former practice. The only difficulty arises in their application to particular cases.

The right of foreclosure by advertisement rests upon the power of sale contained in the mortgage, the proper record thereof, and of its assignments, if any, and the further fact that such power has become operative by reason of some default. An action or

This is just like Stat. Frauds. Plain has a common law right restricted by statute, and the man who would take advantage of a statutory restriction must plead

proceeding instituted at law to recover the mortgage debt has the effect of suspending, for the time, the exercise of the right; but its non-existence can hardly be said to give or create the right. The mortgagee or his assignee, in whom, at the time, is vested the power of sale, is the proper party, and the only one legally competent, to exercise the right by an execution of the power; and when nothing is suggested upon the record going to show its suspension by reason of a suit commenced, or the existence of some disability preventing the party from acting, it must be presumed that he acted rightfully. If any such fact is claimed to exist, it is a matter more properly coming from the other side, and should be set up in the answer.

Judgment reversed.

for plain.

BARKER v. H. & ST. J. R. R. CO.

91 Mo., 86. [1886.]

RAY, J. The petition on which this cause was tried is as follows: "Plaintiff states that upon the — day of —, she was lawfully married to Edward B. Barker, deceased, late of Buchanan county, and at the times hereinafter mentioned she was the wife and now is the widow of said deceased, Edward B. Barker.

"Plaintiff states that the defendant now is, and at the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the state of Missouri, and that it then was and still is engaged in running its steam locomotives, its cars and trains of cars, for the transportation of persons and goods between the city of Atchison, in the state of Kansas, and the city of Hannibal, in the state of Missouri, and particularly through and between the city of St. Joseph, in Buchanan county, and the town of Easton, in said county, and state of Missouri."

"Plaintiff states that the defendant, on the fifteenth day of April, 1879, by its servants, agents, and employees, carelessly, negligently, unskillfully, and recklessly, ran one of its engines and trains of cars upon and over the said Edward B. Barker, and thereby struck and inflicted grievous bodily injury upon the said Edward B. Barker, by reason of which the said Edward B. Barker was then and there instantly killed.

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“Plaintiff states that Edward B. Barker, was run over and killed, as aforesaid, within one year before the commencement of this suit, and at a point on the defendant’s railroad track between the said city of St. Joseph, and the said town of Easton, about one mile southeast of the said city of St. Joseph.”

“Plaintiff states that the deceased, Edward B. Barker, was run over and killed, as aforesaid, by the defendant, without any fault or negligence whatever on the part of the said deceased.”

“Wherefore, plaintiff prays judgment against defendant for the sum of five thousand dollars, according to the statute in such case made and provided, together with the costs of this action.”

The answer of defendant was as follows:

“Defendant, for answer to the plaintiff’s petition, denies each and every allegation therein, excepting, only, the allegation that defendant is a corporation. Defendant, for further answer, says, that the injury sued for was not occasioned by any negligence or default of the defendant, or its servants, or agents, but by the carelessness and negligence of the deceased, Edward B. Barker.”

The reply of plaintiff was a general denial of the new matter contained in the answer. The trial resulted in a verdict in plaintiff’s favor, for the sum of five thousand dollars. The defendant filed, in due time, its motion for a new trial and in arrest, assigning in the latter, among others, the ground that the petition did not state facts sufficient to constitute a cause of action. Both of said motions were overruled, judgment was entered upon the verdict, and the case appealed to this court.

The plaintiff and her deceased husband resided near defendant’s tracks, about two or three miles from St. Joseph, and about eight or nine o’clock, in the morning of April 15, 1879, the plaintiff’s husband, while walking along the track, in the direction of St. Joseph, and about one hundred yards from his residence, was ran over and killed by one of the defendant’s passenger trains, coming from the east and going towards St. Joseph. This action was begun in the Circuit Court of Buchanan county, April 9, 1880, or a year, lacking a few days, thereafter. The object of the action was to recover damages for the husband’s death, occasioned, as alleged, through defendant’s negligence in running said train. In the view we take of a controlling question presented by the record, we deem the foregoing a sufficient statement of the case.

It will be observed that the suit was instituted more than six

months after the death occurred, but within the year, and that there is no averment in the petition that there were no minor children, and, we may further add, that there is nothing in the evidence or record that discloses whether or not there were such minor children. The statute provides that such damages as are here sought to be recovered may be sued for "first by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor children or children of the deceased; or, third, if such deceased be a minor, and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either be dead, then by the survivor." R. S. 1879, sec. 2121. Section 2125, Revised Statutes, provides that every action instituted by virtue of the preceding section of the chapter shall be commenced within one year after the cause of such action shall accrue.

It is contended, for the appellant, that the right of action is vested, and only remains in the wife, absolutely, for the said period of six months, and that her right to sue, after the expiration of the six months, is conditional on the fact whether or not there are minor children, and that the petition is fatally defective, for the want of a further averment, alleging that there were no minor children. On the other hand, it is contended, for the respondent, that the provisions of the statute, as to the time in which the wife may bring her action, are not conditions, but are in the nature of a limitation, only—that they merely affect the remedy, and limit the enforcement of the right—and that the lapse of the six months being such a limitation, it was not necessary for the plaintiff to allege the non-existence of minor children in the petition; but that the same was a defense to be pleaded and proved by the defendant. This presents the controlling question, to which reference has been already made.

It may be observed that damages for a tort to the person, resulting in death, were not recoverable at common law, nor could husband or wife, parent or child, recover any pecuniary compensation therefor against the wrongdoer. Our statute, on this subject, both gives the right of action, and provides the remedy, for the death, where none existed, at common law, and where an action is brought, under the statute, it can only be maintained subject to the limitation and conditions imposed thereby. In conferring the right of action, and in providing such remedy, in

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designating when, and by whom, suits may be brought, it was, as a matter of course, competent for the legislature to provide and impose, such conditions as it might deem proper, and the conditions thus imposed modify and qualify the right of recovery, or form, rather, we think, a part of the right itself, and upon which its exercise depends. In the statute which creates the right of action, and in the same section in which the statutory right and remedy is thus conferred upon the husband or wife, it is further provided, by the second sub-division, as we have seen, that, if there be no husband or wife, or he or she fails to sue in six months after the death, the right of action therefor shall be vested in the minor children of the deceased, if there be such. This provision is not, we think, merely a limitation or bar to the remedy of the wife, but is a bar to the right itself, if there are minor children, and the existence, or non-existence of such minor children is to be held, we think, as of the substance of the right of the wife to sue after the six months have expired. The right of the husband or wife to sue is absolutely for and during the six months after the death. Thereafter, it is within the year, as we think, a conditional right. It is not a proviso, exception, or limitation, enacted in a separate clause or section, but is incorporated, as we have said, in the statute and section which gives the right of action and authorizes her to sue and recover the damages. That this proviso, or condition, is something more than a mere limitation upon the remedy of the widow, is, we think, more apparent from a further consideration of the section, and the other clause thereof. For example, the right of the parents to sue under the third sub-division is based upon the fact whether the deceased was a minor, unmarried, which are, we think, conditions precedent to a recovery on the part of the parents. Suppose, for example, that, in an action by them, under the statute, it was neither averred in the petition nor proved on the trial, that the deceased was a minor, and unmarried, could a recovery be had? Again, suppose, for example, the minor child or children brought the action within six months from the death; or, suppose further, that such minor children instituted suit after the expiration of the six months, and it was neither alleged in the petition nor shown by the evidence, that there was no husband or wife, or that the husband or widow, as the case might be, had failed to sue in the six months.

In none of these cases could a recovery, as we think, be prop-

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erly had; or again, suppose that, as a matter of fact, there are in this case, minor children, and, as we have said, there is nothing to show whether there are or not, and there is, we think, no presumption of law or fact to be indulged, as to whether there are or not, could they be deprived or barred of their right of action, expressly conferred upon them by the statute and, duly brought within the year, by a recovery on the part of the widow in an action brought by her after the expiration of the six months? We think not. 31 Mo. 574. So in the case now before us, where the action is brought by the widow after the expiration of the six months, her right to maintain the same is conditional and depends on the non-existence of the minor children, a material and necessary fact, as we think, and which was not alleged or proved. Section 2125, above set out, is, we think, a statute containing a limitation of time only, and applies to the remedy or enforcement of the rights conferred by the damage act. Its existence as a bar depends, not upon the existence of any party, or upon any thing else beside the mere lapse of the period of time designated. In regard to such statutes, and other statutes of limitations of like import, not thus coupled with, or annexed to, the right of action, the grounds urged by respondent, and the authorities cited, in the main apply, we think, with more force.

As in our judgment the fact, if such it is, that there was no minor child, was one material and necessary to be shown, to entitle the plaintiff to recover in this action, which was begun after the six months had expired, and as there was no evidence offered in that behalf, the instruction in the nature of a demurrer to the evidence, asked by the defendant at the close of the evidence, should have been given. And in the absence of the proper averment in the petition, and in the failure of the proof as to whether there were such minor children, we feel constrained to reverse the judgment and remand the cause. Authorities are not wanting, we think to support these views. Some of them are referred to in the brief of appellant, but, as we are led to the conclusion we have reached, by a construction of our statute on the subject, the authorities need not all be specially cited or quoted. *Railroad v. Hine*, Adm'r, 25 O. St. 629, 634; *Wood on Lim. of Acts*, sec. 9, p. 23.

Our own court has had occasion to construe the statute in question (section 2121, *supra*,) in cases somewhat kindred to

this. In the case of Coover v. Moore, 31 Mo. 574, 576, it was held that, where the person killed left minor children, if the husband or wife of the deceased failed to sue within six months after the death, the right of action of the wife or husband is barred and gone, and that of the minor children vested absolutely. It is further said, that "there being thus no general right of recovery, open to all persons, representing the estate of the deceased, or interested in his life, *only* such persons can recover in such time, and in such manner as is set forth in the statute." In the case of McNamara v. Slavens, 76 Mo. 329, where "M" being killed, through the alleged negligence of defendant, his widow brought an action against defendant, which action she voluntarily dismissed. The minor children, after the expiration of six months from the death of the father, commenced another action; it was *held*, this action would not lie, as the wife had not "*failed to sue*" within the statute. In statutory actions of this sort, the party suing must bring himself strictly within the statutory requirements, necessary to confer the right, and this must appear in his petition; otherwise, it shows no cause of action.

For these reasons, the judgment of the circuit court is reversed and the cause remanded. All concur, except SHERWOOD, J., absent.

McHENRY v. JEWETT.

90 N. Y. 58. [1882.]

Appeal from order of the General Term of the Supreme Court, in the first judicial department, made Feb. 3, 1882, which affirmed an order of general term, granting a preliminary injunction herein. (Reported below, 26 Hun, 453.)

The complaint herein, after alleging facts showing plaintiff's title, to certain shares of the stock of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, which were pledged as security for a loan, and were transferred on the books of the company to defendant as trustee for the pledgee, also alleging that an accounting was pending to determine the amount due plaintiff, and his intention and ability to redeem, concluded as follows:

“The plaintiff further shows, that the defendant is president of the New York, Lake Erie and Western Railway Company, and that, by reason of his control of the said Cleveland shares hereinbefore mentioned, he has been enabled, to a very great extent, to control the management of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, and has managed the same so as to best subserve the interests of the New York, Lake Erie and Western Railway Company, with little or no regard to the best interests of the Cleveland, Columbus and Cincinnati road.

The plaintiff further shows that it is greatly against his interest as a shareholder of the said Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, to permit the defendant to vote upon said shares.

He further shows that at elections heretofore held by the shareholders of the Cleveland, Columbus, Cincinnati and Indianapolis Company the defendant has voted on said 11,477 shares of said stock, and claims the right to vote thereon at future elections, and plaintiff fears he will do so unless restrained and enjoined from so doing.

Plaintiff further shows that he would suffer great and irreparable injury if the defendant should be permitted to vote on said shares.

The plaintiff demands judgment herein, that the defendant be restrained and enjoined from voting, either in person or by proxy, on 11,477 shares of the capital stock of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, or upon any part of said 11,477 shares which are now registered upon the books of said company in the name of said “H. J. Jewett, Trustee,” at any meeting of stockholders for the election of directors of said company, or at any meeting of stockholders of said company for any purpose whatever.

And that said Hugh J. Jewett be enjoined and restrained from giving any proxy or power to any other person authorizing such shares, or any part thereof, to be voted on at any meeting of stockholders.”

The order in question restrained defendant from voting upon the stock in person or by proxy, or from giving a proxy *pendente lite*.

ANDREWS, Ch. J. The complaint shows that the plaintiff is pledgor of shares of railroad stock transferred on the books of

the company to the defendant as trustee for the pledgee, and the action is brought to restrain the defendant from voting upon the shares at the meetings of stockholders, which it is alleged he has heretofore done, and claims the right to do in the future by reason of his title and right as trustee of the stock. The order from which this appeal is taken, granted a temporary injunction restraining the defendant, *pendente lite*, from voting on the shares. We think the injunction was improperly allowed, for the reason that it does not appear from the complaint that the plaintiff is entitled to the final relief for which the action is brought, and in such case a temporary injunction is unauthorized. (Code, sec. 603.) It is claimed on the part of the plaintiff that within the general rule that the pledgee has no right to use the thing pledged, the defendant is not entitled to vote upon the shares, which, it is insisted, is a use of the shares in violation of this rule. On the other hand the defendant claims that the voting power passes to the pledgee of corporate shares transferred on the books of the corporation to the pledgee, as incident to the pledge, and according to the presumed intention of the parties. Without considering this question, but conceding the plaintiff's claim, it does not follow that he is entitled to an injunction restraining the defendant from voting on the shares. It is not sufficient to authorize the remedy by injunction, that a violation of a naked legal right of property is threatened. There must be some special ground of jurisdiction, and where an injunction is the final relief sought, facts which entitle the plaintiff to this remedy, must be averred in the complaint, and established on the hearing. The complaint in this case is bare of any facts authorizing final relief by injunction. It is true that it is alleged that the defendant by the use of the shares, has been enabled to a great extent to control the management of the corporation in the interest of the New York, Lake Erie and Great Western Railway Company, with little or no regard to the best interests of the company issuing the shares. But there are no facts supporting this allegation, nor is it averred that the interests of the latter company have been prejudiced, or that the value of the shares has been impaired by the acts of the defendant. So also it is alleged that it is greatly against the plaintiff's interest as a shareholder, to permit the defendant to vote upon the shares, and that the plaintiff will suffer great and irreparable injury, if the defend-

ant is permitted to do so. But no facts justifying these conclusions, are stated, and the mere allegation of serious or irreparable injury, apprehended or threatened, not supported by facts or circumstances tending to justify it, it is clearly insufficient. Neither injury to the plaintiff's property, inadequacy of the legal remedy, or any pressing or serious emergency, or danger of loss, or other special ground of jurisdiction, is shown by the complaint. The complaint, therefore, does not show that the plaintiff is entitled to final relief by injunction. (Corporation etc. v. Mapes, 6 Johns. Ch. 46; New York Printing, etc. Establishment v. Fitch, 1 Paige 98; High on Injunctions, §§ 22, 34, 35, and cases cited.) The preliminary injunction was granted upon the complaint, and an affidavit verifying the statements therein, without stating any additional facts. It is doubtless sufficient that a probable or *prima facie* case be made, to justify the granting of an injunction, *pendente lite*, but where, as in this case, it clearly appears that the complaint shows no cause of action, then a preliminary injunction is unauthorized, and the granting of it is error in law, which may be reviewed by this court, on appeal. (Code, § 190, sub. 2; Allen v. Meyer, 73 N. Y. 1; Wright v. Brown, 67 id. 1; Collins v. Collins, 71 id. 270; Paul v. Munger, 47 id. 469.)

The order of the general and special terms should therefore be reversed, with costs.

CHRISTAL v. CRAIG.

80 Mo. 367. [1883.]

PHILLIPS, C. This is an action for slander. The petition contains but one count, although it sets out several distinct causes of action. The first assignment of words spoken is: "You and your mob all swore to lies in the probate court in Macon in my suit against the estate. You and John, Lin and Martha all swore to a lie in that case." The second averment is: "Your son Lin has no father. He never did have any. He don't belong to the Christal family. He is not Stewart Christal's child." Third: "You tied horses on the railroad to get them killed, and you got the benefit of it, and you know you did." Fourth: "You have been all over my place at night,

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and in my smoke house pilfering; you have been in my smoke house a dozen times after night." Fifth: "You let your husband starve to death for want of something to eat." Sixth: "You have took my pocketbook and money, and got it there in your bucket." To all of which there was the general averment: "He, the defendant, thereby meaning to charge plaintiff with the heinous crimes of perjury, larceny and adultery." There was no *ad damnum* clause to the petition, but the following prayer at the conclusion of the petition: "Wherefore plaintiff prays judgment against the defendant for the sum of \$5,000, for costs, etc." The answer was a general denial.

At the trial the defendant objected to the introduction of any evidence, for the reasons that the petition did not state facts sufficient to constitute a cause of action, because it mingled in one and the same count several distinct causes of action, and because no damages are alleged in the petition. The court overruled the objection. Defendant then asked the court to exclude all testimony on the charge of perjury, for tying horses on the railroad track, and for starving plaintiff's husband, for the reason that the charges are not so pleaded as to constitute any cause of action. This request the court likewise refused. The testimony and instructions in the case will, so far as may be needful, be noticed in the proper connection in the course of this opinion. The jury returned a verdict for plaintiff in the sum of \$500, and judgment was rendered accordingly. From this judgment the defendant has appealed to this court.

1. The petition in this case is bad pleading. It is true, as contended for by respondent, that the same slander may be stated many times, and in different forms in the same count. But I apprehend that it will be found on an examination of the cases, that the words or utterances thus grouped together in one count, after all, constitute but one substantive offense. The case of *Pennington v. Meeks*, 46 Mo. 217, referred to by counsel, related solely to one offense, the alleged stealing of a hog. So in the case of *Birch v. Benton*, 26 Mo. 153, there was really but one actionable speaking alleged, though in different phraseology. The only actionable words alleged were those charging the defendant with adultery. But this petition contains averments in the same count imputing the crimes of perjury, larceny and adultery. Each of these is a distinct offense for which action might be laid separately. The matter of defense to each might

be distinct, and I am of the opinion that under the code, while they might all be united in the same petition, they should be separately stated with the relief sought for each cause of action. R. S. 1879, § 3512. Bliss on Plead., § 125; Pike v. Van Wormer, 5 How. Pr. 171. But is the appellant in a condition to take advantage of the alleged defect? His remedy was clearly to have moved the court for a rule on plaintiff to elect on which cause of action he would go to trial, and to strike out the others. Mooney v. Kennett, 19 Mo. 551; Otis v. Mechanic's Bank, 35 Mo. 128. Having failed to make such motion, the defect of misjoinder is waived. But does the defendant waive anything more? Suppose the fact be in this case that among the causes thus united in the same count, one or more be bad for failure of a sufficient statement, and there is a general verdict on all the causes, would the verdict and judgment be upheld? The rule is well settled that where the petition contains several causes of action stated in separate counts, if one of the counts be bad for insufficiency in statement, a general verdict for the plaintiff on all the counts will not be sustained. Brownell v. P. R. R. Co., 47 Mo. 243, and authorities cited. On principle it must obtain that where the several causes of action are united in one count, and the case is tried on all, and a simple verdict and assessment of damages in favor of the plaintiff, if one or more of the causes of action assigned be bad, so as not to support the verdict, the verdict must be bad as to all. How is it possible for the court to tell whether the jury took one or all the slanderous words into their estimation? How much proof of the imperfect cause, and how much on the good, did the jury consider? Was it the fact proved touching the bad count that influenced the verdict, and if so, to what extent? Would the jury have given any damages of moment on account of the words properly alleged in the petition, without proof of the others? These are difficulties and complications incident to the violation of the rules of good pleading, which suggested themselves to the mind of Judge Scott, in Mooney v. Kennett, 19 Mo. 553. He clearly indicated the inclination of his mind to the construction we here suggest.

The court below gave, on behalf of the plaintiff, the following instruction:

“(3.) If the jury believe from the evidence that the defendant, at the time and place and manner charged, spoke of

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The first of the charges, it is observed, is that of adultery. Are the facts stated sufficient to constitute the offense? Section 2120, Revised Statutes, makes it actionable to publish falsely that any person has been guilty of adultery. The term "adultery" is employed in this statute in its common law sense or its ordinary acceptance. For the plaintiff, a woman, to be guilty of this offense she must have been married at the time. Abbott's Law Dic., title, "Adultery"; 1 Bouvier's Dic., title, "Adultery." It is not averred in the petition that the plaintiff was a married woman at the time the child Lin was begotten, or at any other time, nor is there enough averred to legitimately authorize the inference. Unquestionably at common law there should have been a *colloquium* averring her coverture, or the birth of the child in lawful wedlock. Has the statute in any wise obviated or modified this rule? Section 3552, Revised Statutes, declares that: "In the action for slander it shall not be necessary to state in the petition any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state generally, that the same was published or spoken concerning the plaintiff." This provision, however, dispenses with the employment of the colloquium only so far as it shows "that the defamatory words applied to the plaintiff," and goes no further. "All the averments necessary in common law pleading to show the meaning of the words must still be made." Bliss Plead., Sec. 305. The change made by the statute in the rule of pleading in this respect, is not to require a statement of the extrinsic facts showing the application of the words to the plaintiff. But the extrinsic facts, when not embraced in the imputed words to show their meaning and the

Const. of Mo. provides that jury shall decide meaning of libelous statements, but the pleading remains the same, as it is still as necessary as at com. law to allege and show that words applied to plaintiff.

character of the person to whom applied, must still be stated as at common law. *Fry v. Bennett*, 5 Sandf. 54; *Pike v. Van Wormer*, 5 How. Pr., *supra*; *Curry v. Collins*, 37 Mo. 328, 329. But is said the *innuendo* supplies the defect, in that it says: ("Meaning he was not a child of plaintiff's husband.") The office of the *innuendo* is simply to apply the words. It is never a substitute for an averment. It is not the statement of a fact, but an inference. Being merely explanatory in its function, the only question raised by it is, whether the explanation given be a legitimate deduction from the fact stated. Authorities cited, *supra*; *Birch v. Benton*, 26 Mo. 154; *Bundy v. Hart*, 46 Mo. 464. This issue, therefore, was improperly submitted to the jury, and the instruction in that respect was erroneous.

II. Another charge made in the petition, and submitted by the court to the jury is: "You have took my pocketbook and money, and have got it there in your bucket." We do not think these words actionable *per se*, without some explanatory averment showing their application. If they were intended and understood to impute the crime of larceny, they would be actionable *per se*. But the question of pleading is, do they, on their face, without more, convey such imputation? To say you have my pocketbook or money in your bucket, does not necessarily or legally imply its theft. The party might reasonably have so taken it under a claim of right, or through mistake or in sport.

This question is well considered in *Andrews v. Woodmansee*, 15 Wend. 232. The charge was forgery. The language *inter alia*, was: "You have got a note with my handwriting to it. I never signed a note with Andrews. I never put my name to that note, nor gave him liberty to do it in God's world." The words were followed by appropriate *innuendoes*. The declaration was held to be bad for lack of the extrinsic explanatory matter. The court say: "The conclusion does not follow from the words. Supposing them to be true, the defendant may still have authorized some third person to subscribe his name to the note, or if it be a forgery, the plaintiff may have passed it to Francher without any knowledge of that fact. If the words can be rendered actionable, it cannot be done without some further averment, either about the occasion or manner of speaking them, or the intent with which they were uttered." The doctrine of that case is affirmed in *Curry v. Collins*, *supra*. Aside from this, the words laid in the declaration in respect of the pocketbook

On strict analysis, meaning of an alleged slanderous or libelous statement is a matter of fact, of ultimate fact; but owing to ignorance of early juries, court treated it as a

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and money, were not sustained by the proof. The charge is: "You have took my pocketbook and money," etc. The testimony most approximating the language is that of the plaintiff herself. Her version is: "You have got \$35 or \$40 in your bucket you have stole from me." "Yes, you have got it right there in your bucket." Manifestly, these are not the actionable words laid, nor indeed, the substance of them. The offense proved may be equivalent to that alleged, but this is not sufficient.

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Though the charge be substantially the same, yet if in different phraseology it will not support the action. *Berry v. Dryden*, 7 Mo. 324; *Birch v. Benton*, *supra*, 161, 162. In fact it is very questionable whether any of the charges were sustained in legal strictness by the proofs.

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III. It is further assigned for error that the petition is radically defective in that it contains no *ad damnum* clause. Under the old system of pleading, it was perhaps, prerequisite to a judgment that the declaration should contain an allegation that the complainant had thereby been damaged, with a prayer for judgment therefor. *Deveau v. Skidmore*, 47 Conn. 19; *Brownson v. Wallace*, 4 Blatch. 465. But we incline to the opinion that under our code of practice, the petition in this respect is sufficient. Section 3511, Revised Statutes, requires "a plain and concise statement of the facts, etc., with a demand of the relief to which the plaintiff may suppose himself entitled." The amount of damages is ascertainable from the facts alleged, and the plaintiff's estimate of them appears from the prayer. This view is supported by Wait's Practice, Vol. 2, p. 387. * * *

Judgment reversed.

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BANCROFT v. HASLETT.

106 Cal. 151. [1895.]

HENSHAW, J. Action for damages for conversion of a piano. Defendants pleaded that the piano was stored with them as warehousemen, and, after due notice to plaintiff, was sold to pay charges. They claimed that the sum of \$10 was yet due on account of such charges, and asked judgment for that amount. The appeal is from the judgment alone.

The action was commenced upon November 14, 1892, and al-

leged the conversion as of July, 1892. The court found that defendants converted the piano to their own use upon Feb. 22, 1891. The variance is immaterial and not such as would warrant a reversal of the cause. Code Civ. Proc. §§ 470, 475. It was not necessary at common law that the proofs should be in strict conformity with the averment as to the date of the conversion. It was sufficient if, naming a certain time before the commencement of the action, the proof established that the tort was committed before the suing of the writ. 2 Saund. Pl. p. 1141; Gould, Pl. § 65; Rex. v. Bishop of Chester, 2 Salk. 561; 1. Greenl. Ev. § 71 *et seq.* No greater strictness is required under our system. The findings are sufficient. They show that the piano came into the defendant's possession against plaintiff's will; that it was not stored because of plaintiff's refusal to pay the lawful charges upon it, but was stored without authority; that plaintiff demanded its return, and was refused; and that thereafter the defendants converted it to their own use. These facts sustain the judgment, and negative the claim of defendants. Additional findings would not, therefore, affect the judgment, nor afford the defendants any relief. Robarts v. Haley, 65 Cal. 402, 4 Pac. 385; Malone v. County of Del Norte, 77 Cal. 217, 19 Pac. 422; Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589; Diedendorff v. Hopkins, 95 Cal. 347, 28 Pac. 265, and 30 Pac. 549. The judgment is affirmed.

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PIER v. HEINRICHOFFEN.

52 Mo. 333. [1873.]

EWING, Judge, delivered the opinion of the court.

This is an action on a promissory note by the plaintiffs as indorsees against the defendants as indorsers, payable at the office of Williams, in St. Paul, Minnesota; the note bears date, St. Louis, October 12, 1860, and is payable on the first day of July thereafter (1861.) The petition contains the usual averments of presentment and demand of payment at the maturity of said note, refusal to pay, protest of the same, and that defendants were duly notified thereof. The answer of defendants is a denial of the allegations of the petition. Plaintiffs made application for a continuance of the cause, on the ground of the ab-

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sence of witnesses, who resided at St. Paul, by whom they expected to prove facts excusing the delay in making the demand of payment, and in giving notice to the defendants. The motion for a continuance being overruled, and the cause being submitted to the court,—jury waived,—the plaintiffs read the note in evidence, and then offered to show by the certificate of protest of one Mahmros, a notary public, and his depositions accompanying the same, that said note was presented for payment at the place where the same was made payable, that it was protested, and notice given the defendants on the 15th day of July, 1861. This evidence was excluded on the objection of defendants, whereupon plaintiffs took a non-suit with leave, etc. The motion to set aside the non-suit being overruled, the cause is brought to this court by appeal. * * *

The order in which evidence may be introduced is a matter very much in the discretion of the court, and this discretion may be properly exercised by inverting the regular order, and admitting evidence that presupposes facts, which logically and naturally precede it, but when such evidence is offered abstractly without an offer to sustain it by proof of such antecedent or primary facts, and without which it would be wholly unavailing, and no intimation of such a purpose is given to the court, we cannot say that the court erred in excluding it.

This evidence, however, was rightly excluded on more substantial grounds. The petition avers that demand of payment was made *at the maturity* of the note, and that defendant was duly notified thereof. This allegation was put in issue by the answer. Neither the evidence offered nor that of the absent witness, as disclosed by the affidavit for a continuance, tended to prove this averment, but on the contrary to *disprove* it by showing an *excuse* for not making the demand at the time alleged in the petition.

It may be conceded, that at common law this petition would be sufficient; that the averments would be sustained by proof of any state of facts showing an excuse according to the custom of merchants, by proof of facts which dispense with actual demand and show due diligence, without stating them specifically in the pleading.

Is this good pleading however under our code? For not only the forms of pleading, but the rules by which the sufficiency of pleadings, except where otherwise specially provided, are to be

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determined and prescribed by our Practice Act. (2 W. S. § 1, p. 1012.)

As the vice of the old system of pleadings was its prolixity, its general averments, and general issues, and the delay and expense inseparable from it, the new system (or the modifications of the old) which we have adopted has little claim to be considered a *reform*, unless it avoids such defects and furnishes rules, by which the great object of all pleadings is better attained, namely, to arrive at a material, certain and single issue. Hence, the great improvement of our code consists in requiring the pleadings to contain a plain and concise statement of the *facts, constituting* a cause of action, or matter of defense. (2 W. S. 1013, § 1015, § 3.) Facts, and not evidence, nor conclusions of law, must be distinctly stated. Every fact, which the plaintiff must prove to maintain his suit, is constitutive in the sense of the code, and must be alleged. Facts, which dispense with the necessity of making demand of payment and giving notice to the indorser, are as essential to the plaintiff's right of recovery, as the fact that the defendant indorsed the note, or that it was executed and delivered by the maker, or that plaintiff is the holder. And the defendant has the right to controvert the one or the other in his answer. He should therefore be informed by proper averments in the petition, what facts are relied on to charge him, so that he may have an opportunity to controvert them. Such an allegation of demand of payment at *maturity*, and due *notice* thereof to the indorser, could give no intimation to the defendant of the nature of the evidence, by which the plaintiff proposed to sustain it. He could only know, that he received no notice; but of what steps if any were taken to give it, or of the causes of the failure to give it, or of the facts relied on to excuse the want of it he of course is presumed to have no knowledge. These are matters within the knowledge peculiarly of the plaintiff, which he should allege in his pleading, and prove. He alleges facts the legal effect of which if true could charge the defendant; but he claims, that he should be allowed to sustain this allegation by facts of a totally different character, not alleged in his petition, because the same legal consequence would follow.

In *Garvey v. Fowler*, 4 Sandf. 665, it was held, that where in an action on a check, facts are relied on which excuse notice of presentment and non-payment, as that the drawer had no funds

The com. law rule regarding demand was not consistent with the purpose of pleading, but arose from the anomalous pleading in general assumpsit, in which the actual issue was never the issue found in the pleadings.

Rule under Code is different. Character of facts made, not by any person other than plaintiff or the Code by striving to get back to main purpose of pleading.

in the bank the day the check was presented, they must be stated in the complaint. And that an averment of due notice will not be sustained by evidence of facts excusing notice.

To the same effect is *Schultz v. Dupuy*, 3 Abb. Pr. 252.

The question has been decided the same way in Iowa, *Lambert & Co. v. Palmer, et al.*, 29 Iowa 104, the court holding that under an averment like that in the case at bar, there could be no recovery upon proof of facts amounting to a waiver of demand and notice, as a subsequent promise to pay by the drawer or indorser after full knowledge of the facts. See, also, *Cole v. Wintereost*, 12 Tex. 118.

It is scarcely necessary to add, that the codes of New York, Iowa and Texas, in respect to the rules of pleading, are substantially the same as our own.

*Judgment affirmed.**

for def.

GRANNIS v. HOOKER.

29 Wis. 65. [1871.]

Action to recover money received by the defendant to plaintiff's use.

The complaint alleges, in general terms, the receipt of \$535, by the defendant to the plaintiff's use, demand of payment, and a refusal to pay over the same, or any part thereof.

The answer is a general denial.

In his opening at the trial, the plaintiff's attorney stated the facts which he expected to prove, showing that the plaintiff was induced to pay over to the defendant the money sued for, by means of certain false and fraudulent representations made to him by the latter, relative to the purchase of oil lands for a company of which he was a member.

The defendant objected to the admission of any evidence under the complaint, on the ground that it does not state facts sufficient to constitute the cause of action stated by the plaintiff's counsel in the opening.

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above
he (P. v. H.) { *Compare: *McCullough v. Insurance Company*, 113 Mo. 606, in which it is held that under a general allegation of performance by the plaintiff he may prove a waiver of conditions in an insurance policy.

The objection was sustained, and judgment of non-suit entered; from which the plaintiff appeals.

COLE, J. The question arising in this case is really whether the complaint states a cause of action. The complaint contains what, under the former system of pleading, would be called a count for money had and received. On the trial, the attorney of the plaintiff made a statement of facts to the court and jury out of which the action arose, and then proceeded to support the issue on the part of the plaintiff by calling and having sworn a witness. Whereupon the defendant objected to any evidence being given under the complaint, on the grounds that it did not state facts sufficient to constitute a cause of action. This objection was sustained. The case therefore stands in the same attitude that it would on a general demurrer to the complaint.

We are inclined to hold the complaint sufficient on demurrer. According to the statement made in his opening by the plaintiff's counsel, the defendant procured the money sued for by means of fraud in an oil land speculation. It is claimed by the defendant that all the facts in respect to the alleged fraud should have been distinctly stated in the complaint, otherwise the plaintiff is not entitled to prove them. On the other hand, it is claimed that all it is necessary the complaint should contain is substantially an allegation that the defendant has received a certain amount of money to the use of the plaintiff, as in the old form of a declaration in *indebitatus assumpsit*. We are inclined to sanction this latter view, and to hold that the facts, which, in the judgment of law, create the indebtedness or liability need not be set forth in the complaint. If the complaint does not state with sufficient certainty the facts in respect to the defendant's obtaining the money from the plaintiff, the better practice is to move to have the pleading made more definite and certain. But we really do not see any more reason for requiring the complaint to state all the facts and circumstances about the manner the defendant obtained or received possession of money which in equity and good conscience he ought to pay over to the plaintiff, than, in case of a payment or loan of money, to require the pleading to contain all the facts in respect to such loan or payment. A complaint alleging that the defendant was indebted to the plaintiffs in a specified sum for goods sold and delivered to the defendant at his request, and that such sum was due, was held to be sufficient on demurrer in *Allen v. Patterson*,

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at com. l.

this case goes back to the *Dexter* com.
law rule which allowed a variance in
case of gen. assumpsit. In this respect
code has not reformed com. law plead-
ing; & common counts are still used to-day.

7 N. Y. 476. Also a complaint to recover for money lent to and paid, laid out and expended for the defendant, at his request, was held sufficiently definite and certain on motion in Cudlipp v. Whipple, 4 Duer, 610. The statement of the fact showing that the defendant had received money to the use of the plaintiff, which he was bound to pay over to him, was of the most general character, in Bates v. Cobb, 5 Bosworth 29; Adams v. Holley, 12 How. Pr. 326; Betts v. Bache, 14 Abb. Pr. R. 279; Sloman v. Schmidt, 8 do., 5; Goelth v. White, 35 Barb. R. 76, and yet the actions were sustained.

The case of Lienan v. Lincoln, 2 Duer 670, is cited by the defendant's counsel in support of the position that a general allegation in a complaint that the defendant has received money to the use of the plaintiff is bad on demurrer. But a just criticism upon this case will be found in note 4, p. 213, Tiff. & Smith, N. Y. Prac. The editor says that, although the head note in Lienan v. Lincoln, states such a doctrine, yet that the complaint there alleged that the defendant was indebted to the plaintiff's assignor "for moneys, *notes*, and *effects* before that time had and received," while the account annexed showed that more than all the balance claimed consisted of promissory notes received by the defendant, and there was no allegation that these notes had been paid so as to render the defendant liable for their amount.

{ In the case before us it is, in substance, averred that the defendant received from the plaintiff five hundred and thirty-five dollars to the use of the plaintiff; that the plaintiff has demanded the payment thereof; and that the defendant has refused to pay the same or any part thereof. We are inclined to hold this complaint sufficient in substance.*

By the Court: The judgment of the circuit court is reversed, and a new trial ordered.

for plain.

*See, also, Richardson v. Moffitt, 92 Mo. App. 515.

NEW YORK NEWS COMPANY v. NATIONAL
STEAMSHIP CO.

148 N. Y. 39. [1895.]

O'BRIEN, J. The complaint in this action alleged that the defendant was indebted to the plaintiff in the sum of \$591.18, a balance due from defendant for work, labor and services in advertising for and at the special instance and request of the defendant. The defendant, by its answer, denied this allegation. The plaintiff, on the trial, gave proof tending to establish an agreement between the parties to the effect that the plaintiff should do certain advertising for the defendant, and he paid therefor in the tickets of the defendant; that plaintiff did perform the work in advertising, and had received thereon a certain quantity of tickets, but leaving still due the amount stated in the complaint; that the plaintiff had demanded the balance of the bill from the defendant in tickets, but the demand was refused. The plaintiff claimed that these facts established a money indebtedness from the defendant. The rule in this state seems to be that, where a party agrees to pay a specific sum, or, as in this case, the value of the services in some specific articles of property, and upon demand refuses or fails to deliver the property, his obligation is thereby converted into one for the payment of money. 1 Sedg. Dam. (8th ed.) § 280; Gleason v. Pinney, 5 Cow. 152; Smith v. Smith, 2 Johns. 235; Brooks v. Hubbard, 3 Conn. 58. There was some conflict in the evidence as to the facts, but the court submitted all the questions to the jury, and the verdict must be taken as establishing in plaintiff's favor, the performance of the work at the price alleged, the agreement to pay in tickets, and the refusal to do so, and the consequent obligation to pay in money.

The only point urged by the defendant in support of the appeal which it is necessary to consider is the contention that the plaintiff set out in the complaint one cause of action and recovered upon another and different cause of action. The plaintiff has stated the facts constituting the cause of action, not as they actually existed, but according to their legal effect. In most cases either mode of pleading, at the option of the party, is correct. Bennett v. Judson, 21 N. Y. 238; Farron v. Sherwood, 17 N. Y. 227; Barney v. Worthington, 37 N. Y. 116. In pleading

facts according to their legal effect, it may sometimes happen that the opposite party is left in the dark as to the proof which he may be required to meet at the trial, but, ordinarily, this difficulty can be avoided by motion, when necessary, to make the pleading more definite and certain. In this case, if the defendant had any doubt as to the identity of the claim that it was required to defend, a simple demand for a bill of particulars, or a motion, would make everything clear. The material part of the complaint was the allegation of a money indebtedness by defendant to plaintiff, and that allegation was supported by proof of the agreement to perform the work for payment in tickets, the performance of the work, and the refusal to deliver the tickets. In other words, the fact pleaded, according to its legal effect, was proved by proof of the facts as they existed. So there was no variance that the defendant can complain of. The other questions discussed relate to the proofs given. It is not very clear, but its sufficiency and interpretation were for the jury. The judgment must, therefore, be affirmed. All concur.

Judgment affirmed.

for plain.

WIEDE v. PORTER.

22 Minn. 429. [1876.]

The complaint alleges the sale of a pair of horses by defendant to Albert Shaeffer, with warranty that they were good roadsters, good and true workers in harness, and not balky; a breach of the warranty, and damages resulting therefrom to Shaeffer, and an assignment of the cause of action from Shaeffer to the plaintiff. The answer puts in issue the sale, the warranty, and the assignment. At the trial in the court of common pleas of Ramsey county, before BRILL, J., the plaintiff testified that he purchased the horses in question from the defendant, and traded organs and melodeons for them. His counsel then offered to prove that, in trading for the horses, the plaintiff was acting for Albert Shaeffer, who was the assignee of Wiede & Ross, for the benefit of their creditors, and that the horses were paid for out of property held by Shaeffer as such assignee, to be followed by proof of the warranty and breach, and assignment of the demand to plaintiff. The evidence offered was objected to

At con. law, in giving prim on contract made by agent, it was customary to allege that def. made the contract, & then prove at trial that contract was made with def's. agent & that the latter had author-

as immaterial and not pleaded, the objection was sustained, and plaintiff's excepted. The plaintiff then offered in evidence the written assignment from Wiede & Ross to Shaeffer, to be followed by the proof already offered, which was objected to by defendant "as immaterial, irrelevant and not pleaded," and was rejected, plaintiff excepting. The witness then testified, "I was acting for Albert Shaeffer, assignee of Wiede & Ross, in making the trade with defendant for the horses." His counsel then asked him what was said by defendant in regard to the character of the horses at the time of the trade, to which the defendant objected as "immaterial, irrelevant, and not pleaded, and because of the last answer of the witness that in making the trade he was acting for Albert Shaeffer, assignee of Wiede & Ross." The objection was sustained, as was also an objection to any further testimony on the part of plaintiff relating to the trade, if Shaeffer, in making the trade, was acting as assignee of Wiede & Ross, the plaintiff duly excepting. The plaintiff then rested his case. The court directed a verdict for defendant, on which judgment was entered, and the plaintiff appealed.

CORNELL, J. This case comes before us upon exceptions to the ruling of the court upon the admissibility of certain testimony offered under the issues made by the pleadings. The real question presented is whether, upon an issue raised by a denial of the execution of a contract of sale and warranty, alleged to have been made between defendant and one Shaeffer, it was competent to prove that such contract was made by the duly authorized agent of Shaeffer; in other words, when the contract of the principal, which constitutes the foundation of the cause of action, is made through the intervention of an agent, is it necessary, in pleading it, to aver that fact and the authority of the agent?

Issuable facts alone are required to be stated in a pleading, and those according to their logical and legal effect. In this case the fact traversed by the answer, the proof of which would support the action, was the execution of the particular contract. If it was entered into by the party, its effect was the same, whether done by the principal personally or by his authorized agent. In either case it was the contract of the principal. The complaint was sufficient to allow the evidence offered, tending to show that the alleged contract was, in fact, the contract for

*not necessary
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Shaeffer, and the exclusion of such evidence was error, for which a new trial must be granted.*

Judgment reversed and new trial ordered.

for plan

Section 2. The Prayer for Relief.

★ COBB v. SMITH.

23 Wis. 261. [1868.]

The plaintiffs, in each of these cases, appealed from an order of the circuit court modifying judgment in their favor which had been entered by the clerk. The case will appear from the opinion.

PAINE, J. These three appeals present the same question, and will be disposed of together. The actions were brought for a flowing of the lands of the plaintiffs by means of a dam erected and maintained by the defendants. The litigation has already been twice before this court. In *Newell v. Smith*, 15 Wis. 101, it was decided that the act purporting to allow the defendants to flow the lands of others, was unconstitutional, because it did not make any adequate provision for compensation. In *Cobb v. Smith*, 16 Wis. 661, it was decided that the plaintiffs were not entitled to maintain an equitable suit to prevent the reconstruction of the dam, by reason of their long acquiescence in its maintenance, and in the erection of valuable mills and improvements depending on it for their power. And it was said that for the damage occasioned by the flowing, the plaintiffs had "their common-law remedy."

It seems that the complaints were then amended, so as to turn them into actions for damages, and the cases proceeded to trial, and the plaintiffs had verdicts fixing the amounts of damages respectively. On these verdicts the counsel for the plaintiffs procured the clerk to sign judgments, not only for the damages and costs, but also directing the sheriff to abate the dam. Applications were then made by the defendants to set aside the latter provision in each judgment, upon affidavits showing substantially the same facts as to acquiescence and the erection of

*Compare *Lewis v. Hatton*, 26 S. W. (Tex.) 50.

valuable mills, etc., that appeared in the equity case above referred to, and also showing that this feature of the judgment was a surprise upon the defendants, who did not suppose that any such relief was sought in the action, and that the attention of the court was not called to it, nor was that of the defendant's counsel, and that the clerk supposed, when he signed the judgments, that they were only judgments for the damages and costs in pursuance of the verdicts. The court below granted the applications, and from those orders these appeals are taken. Its decision was based entirely, as appears from the opinion printed in the case, upon the decision of this court in the equity case above cited. And the counsel for the appellants have shown, that it does not follow from that decision that the action of the court below, now under consideration, was proper. There is undoubtedly a wide difference between a court of equity saying that it will not lend its aid to enforce a legal right, where there are equitable reasons for its refusal, and a court of law saying that a party who recovers in an action at law shall not have such a judgment as the law directs. In the one case the court has a discretion, based upon those equitable principles and considerations upon which the system of equitable jurisprudence was built up, which entitles it to refuse its peculiar relief in cases where it would cause oppression and injustice. But a court of law has no discretion, resting upon such considerations, to refuse to any party such a judgment as the law provides for, in an action wholly at law. If, therefore, these actions, in the form which they finally assumed, are to be regarded, as the court below intimated, as actions for a private nuisance, within the meaning of section 1, chapter 144, R. S., then I do not think it would follow that the plaintiffs were not entitled to the judgment there provided for, because this court had decided, that, for the reasons already mentioned, a court of equity would not interfere by injunction to prevent the reconstruction of the dam after it had been carried out by a flood.

But I do not think these actions should be regarded as actions for a private nuisance, within the meaning of that section. The injury complained of is undoubtedly a private nuisance, and the plaintiffs might have proceeded for the purpose of abating the nuisance, if they had seen fit. But they were not bound to do so. They were at liberty to bring their actions merely for the recovery of the damages; and this, I think, is what they have

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Prayer becomes very important in some cases to determine the nature of the action. Frequently same state of facts will support an action at law or in equity. When court has fixed the

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done. It is true, the facts showing the injury to the land are all stated, and with sufficient particularity to warrant a prayer for the abatement of the dam as a nuisance. But the complaints did not contain any such prayer. No such relief was asked. And under the present system of practice, which requires the plaintiff to state in his complaint the relief he desires, I do not think an action should be regarded as an action to abate a nuisance, unless that relief is demanded in the complaint. This court has decided, in *Gillett v. Treganza*, 13 Wis. 472, that where the facts stated in a complaint might sustain several different kinds of action, the prayer for relief will be held to determine the character of the action. And the decision is applicable here. The plaintiffs asked only for damages, and that makes the actions, actions for damages only, although, upon the same facts, the plaintiffs might have been warranted in asking to abate the dam.

In *Abbott's Forms*, vol. 1, p. 474, a form for a complaint in such an action is given, where such relief is expressly asked. Such a prayer was in the complaint in *Cromwell v. Lowe*, 14 Ind. 234, though under their statute the court had a discretion to abate or not. But, without any express authority upon the point, our statute, requiring the plaintiff to state what relief he desires, is amply sufficient to show that, if he does not ask to have the dam abated, the action should not be considered as brought for that purpose.

An action for a private nuisance, within the meaning of the section of the statute above referred to, should be held to be only an action the object of which is to abate the nuisance. That such was its intent is clear from the fact that it provides that, in such cases, the judgment shall be that the nuisance be abated. And, under the present practice, an action cannot be considered of that character unless that relief is demanded in the complaint. Where such relief is sought, it is usually by far the most important object of the suit; and where the plaintiff omits to ask for any such relief, the defendant has a right to assume that the action is not an action for a nuisance within the meaning of that statute.

The justice and propriety of this ruling seem obvious, and this case fully illustrates it. The complaint asking nothing but damages, the defendants were thrown off their guard. They justly concluded that they were not called on to defend against

At com. law the kind of action was fixed by the writ; but as under Code we have abolished the old writs, prayer for relief must be criterion. So prayer for relief is used to determine

any other claim. They therefore neglected to set forth in their answer such facts as might have entitled them to the affirmative interference of a court of equity to prevent the plaintiffs from enforcing their legal right to the abatement of the nuisance. That upon a sufficiently strong case, a court of equity ought so to interfere, I have no doubt. The same principles which induce it to refuse its own aid to the party whose land is flowed, where he has acquiesced for a long time in the maintenance of the dam, and in the erection of valuable mills and improvements dependent upon it, ought to induce it to give affirmative assistance to the other party, to prevent the assertion of a strict legal right, of trifling value, to the destruction of great and valuable interests that have grown up on the faith of such acquiescence. Undoubtedly the court should attach just conditions to such relief, and should compel the payment of all that the land-owner ought in equity to receive. But having done this, it should prevent him from asserting his legal right to abate the dam at the expense of such injustice and hardship to others. The cases establishing the principles upon which courts of equity refuse their own aid in such instances, are cited in *Sheldon v. Rockwell*, 9 Wis. 166. And the following sustain the conclusion that the court would not only refuse its own aid, but would affirmatively interfere to prevent the party from asserting his strict rights at law, in a proper case: *Sprague v. Steere*, 1 R. I. 259; *Trenton Banking Co. v. McKelway*, 4 Halst. Ch. 84. The case from Rhode Island was itself a case of the former class, but it refers approvingly to several old cases of the latter. Under the old practice, the mode of obtaining this relief would have been by a separate equitable suit. Under the present, it could be obtained in the suit at law, but only by setting up the facts in the answer, and asking it as affirmative relief. Hence the necessity of indicating in the complaint the kind of relief sought by the plaintiff, that the defendant may have a fair opportunity to defend against it, or any part of it.

I attach no importance to the fact that these complaints contained the old equitable prayer for general relief. Such a prayer is inappropriate to a complaint in an action at law, and does not tend in any manner to supply the place of a specific demand of particular relief, which, if sought, gives character to the whole action.

If these complaints had asked for this relief, and the defend-

ants had neglected to plead and present any equitable defense they might have had, they could not have been relieved on these motions. The judgments would then have been proper. But as they did not ask for it, and as the actions, for that reason, could not fairly be regarded as being brought to abate the nuisance, the defendants were not called on to defend against that relief, and that part of the judgments may well be regarded as a surprise upon them, from which they were entitled to relief on motion.

For these reasons, I think the orders appealed from should be affirmed.

By the Court: Orders affirmed.

for def - no abatement of the nuisance

GRAND ISLAND SAVINGS & LOAN ASS'N v. MOORE.

40 Neb., 686. [1894.]

Appeal from a deficiency judgment rendered in an action to foreclose a mortgage.

*a general
prayer for
relief in order
to fore-
close a
mortgage,
without
deficiency
judgment?*

IRVINE, C. * * * The second objection is based upon the failure of the petition to pray for a deficiency judgment. The prayer was "for a finding of the amount due on said claim, and for a decree of foreclosure, an order of sale of the said property to satisfy the said claim, and for such other and further relief as is just and equitable." Whether a deficiency judgment can be allowed under a prayer for general relief is a question not free from doubt, and its solution is rendered more difficult, rather than aided, by such authorities as we have been able to find. It would seem that under the general rule that a prayer for general relief permits the allowance of any relief applicable to the case, and not inconsistent with the particular relief demanded, such a prayer would be sufficient to authorize the rendition of a judgment for the deficiency. The courts have, however, exhibited a tendency to depart from this general rule in such cases, but their decisions are largely based upon statutes more or less differing from those of this state. Counsel contend that the case of *Brownlee v. Davidson*, 28 Neb. 785, 45 N. W. 51, implies that no special prayer for a deficiency judgment is necessary. We cannot see, in that case, any such implication. On the contrary, it does appear, clearly, from that case, that at

statute authorized court of equity to render personal judgment in case of foreclosure. Now before the court will grant foreclosure, it goes over the entire case & moves the debt to ex-

some stage of the proceedings the plaintiff must ask for a deficiency judgment before error can be predicated upon failure to allow it. This is the only authority cited in the briefs. We have, however, pursued the investigation somewhat further. In *Giddings v. Barney*, 31 Ohio St. 80, under a similar prayer, the court discussed a statute which it was claimed permitted a mortgagee in one action to foreclose his mortgage, and obtain a personal judgment upon the debt. It was held that the personal judgment could not be allowed under a prayer similar to that in the case under consideration, but the court disclaimed the intention to deny the power of awarding execution for a balance due after the property was exhausted. The inference is that such relief could be had. In *Foote v. Sprague*, 13 Kan. 155, the petition asked for a foreclosure and sale, and that execution should be issued for the balance. A personal judgment was rendered. The supreme court held that, where the prayer was no more defective than in that case, it might be amended at any time, and, upon petition in error, would be considered as amended. In Wisconsin the statute permits a deficiency judgment only where it is demanded. In *Olinger v. Liddle*, 55 Wis. 621, 13 N. W. 703, a prayer for execution for any balance was held sufficient to meet the requirement of the statute. In Kentucky, under a prayer for foreclosure and general relief, it was held, in *Hansford v. Holdman*, 14 Bush. 210, that the rendition of a deficiency judgment was erroneous, where the defendant made no defense to the action. But this was because a statute provided that if no defense be made the plaintiff cannot have judgment for any relief not specifically demanded. This principle would seem quite clear. In New York the statute is similar to that in Kentucky, and the cases in that state usually cited as holding that a special prayer is necessary are based upon the statute, and intimate that where a defense is made the rule would be different. *Simonson v. Blake*, 20 How. Pr. 484; *Peck v. Railway Co.*, 85 N. Y. 246. The result of these cases seems about as follows: In Ohio, we have a dictum that the general prayer is sufficient; in Wisconsin, a liberal construction given to a special prayer, to make it conform with the statute; in Kansas, an implication that a special prayer is necessary, but defective prayer treated as amended so as to supply the defect; in New York and Kentucky, an inference that the general prayer is sufficient, where the defendant, by making a defense, has deprived himself of the protection legal relief, & case is gone over before foreclosure & def. has opportunity to defend against proving the debt & it would hence be not unfair to def. to grant deficiency judgment.

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of a statute demanding a different rule. We have not in this state any statute similar to those of Wisconsin, New York, or Kentucky. The protection afforded defendants in default by those statutes is partially given here by section 64 of the Code of Civil Procedure, providing that, in an action for the recovery of money only, there shall be indorsed on the writ the amount for which judgment will be taken, if the defendant fail to answer, and that, if the defendant fail to appear, judgment shall not be taken for a larger amount, and the costs. In *Jones v. Null*, 9 Neb. 57, 1 N. W. 867, it was held that a suit to foreclose a mortgage was not an action for the recovery of money only. Still, we are not required to decide what rights the defendant would have, on failure to appear in such a case, if there was no indorsement upon the writ. The record contains neither the process, the answer, nor the decree. If the appearance of defendant was necessary to give the court power to act, it must be presumed that there was such appearance. It would seem, therefore, that the prayer was sufficient to justify the rendition of the deficiency judgment; but, if not, then we are quite clear that it might be amended, with notice to the defendant, so as to ask for the judgment, and the motion for the judgment, especially where it is couched in such language as it was here, should be treated as an amendment. The record shows affirmatively that notice of the motion was served upon the defendant, and that he appeared in response thereto. The amendment was also in time. It came before the judgment was rendered, and no attempt was made to take advantage of any finding affecting the right to the judgment which may have been contained in the original decree. The right to the judgment was tried upon its merits, subsequent to the motion, and after defendant's appearance to the motion. * * *

Judgment affirmed.

for plain.

NEWHAM v. KENTON.

79 Mo., 382. [1883.]

PHILIPS, C. This is a bill in equity. The petition states that plaintiffs are husband and wife; that the wife contracted with the defendant Kenton, to the effect that, as her agent and trustee, he would purchase certain described real estate in the town

of Norborne, in Carroll county; that she furnished the money, and the title was to be taken in the name of the defendant, and immediately thereafter he should convey to her; that the money was accordingly furnished, the purchase made by defendant and the title conveyed to him by the vendor. The petition then averred that soon after said purchase the plaintiff, with the consent of defendant, entered into the possession and enjoyment of the premises, and had ever since so held the same, making large and lasting improvements thereon, such as erecting a house, etc., at the outlay of about \$1,000. It is averred that the defendant, though often requested thereto, has wholly failed, refused and neglected to make conveyance to the plaintiff Margaret, as he had agreed to do, and as in equity, etc., he was bound to do. The prayer of the petition is for a decree requiring the defendant to execute to her a good and sufficient deed vesting in her the right and title so acquired by defendant and for proper relief. The answer is a general denial.

The bill of exceptions recites that: "The plaintiffs, to sustain the issues on their part, offered evidence tending to prove the facts set forth in the petition. The defendant, to sustain the issues upon his part, offered evidence to sustain the allegations pleaded in his said answer. This was all the evidence offered."

Upon this state of the case the court rendered the following decree:

"Now at this day come the parties, by attorneys and in person, and each party being ready for trial on the pleadings, and the court, after hearing the testimony for plaintiffs and defendant, and the argument of counsel, finds the facts to be as follows: That on or about the 17th day of January, 1876, the defendant, under and by virtue of a verbal contract, entered into between him and the plaintiff Margaret P. Newham, purchased of one M. C. Huff and wife the real estate described in the petition for and on account of the plaintiff at and for the sum of \$230; that by the contract and agreement between the said M. P. Newham and defendant, the deed to said real estate was made to defendant as trustee for the plaintiff, and that said deed has been duly made and recorded in Carroll county, but that said deed does not express said trust; that shortly after said purchase, as aforesaid, a further contract and agreement was made and entered into between plaintiff M. P. Newham and the defendant to this

effect: That plaintiff, M. P. Newham and the defendant would erect and build a two story frame storehouse, of the kind and character mentioned in the petition, on said lot; that each party was to bear half of the cost of the building and the defendant to pay one half of the purchase money for said lot, and each to be and become equal owners of said house and lot. The plaintiff, M. P. Newham, in the summer and fall of 1876, built and erected said storehouse at a cost of \$800; that defendant Kenton furnished labor and material for said building to the amount of \$100 only; that plaintiff has held and occupied said building from some time in the fall of 1876 up to the present time; that defendant has failed and refused to carry out said contract either by executing a deed to plaintiff for an undivided half of said lot or by paying his half of the balance of the cost of said building; and that the balance due from defendant to plaintiff M. P. Newham on half the cost of lot and building, after a full settlement of lot and house transaction, is the sum of \$339 up to date. It is, therefore, ordered, adjudged and decreed by the court that the said defendant, Thomas Kenton, execute and deliver to plaintiff a good and sufficient deed conveying to said plaintiff, Margaret P. Newham, an undivided one half of said real estate, to-wit: Twenty-five feet off the south end of lots numbered 9, 10, 11 and 12, in block number 16, in the town of Norborne, Carroll county, Missouri, and that, in default of the execution of said deed, all the right and title of the defendant, Thomas Kenton, in and to said undivided one-half of said real estate be divested, and vested in plaintiff, Margaret P. Newham. And it is further ordered and adjudged that plaintiff, M. P. Newham, have and recover of the defendant, Thomas Kenton, judgment for the sum of \$339, together with the costs of this suit, which are taxed at the sum of \$——, and that execution issue therefor."

From this decree, after an ineffectual motion for a new trial and in arrest, the defendant has appealed. The question to be decided is, as to the propriety and right of this decree.

It was ever the rule in equity to set out with particularity and the utmost circumspection as to truth, the facts forming the gravamen of the complaint. The bill being addressed to "the forum of conscience," the whole facts should be disclosed that the chancellor might ex æquo et bono make decree. The code of practice applicable alike to actions at law and in equity requires

"a plain and concise statement of facts constituting the cause of action." The facts thus stated constitute the cause of action and none other. It is a great misapprehension to suppose that one cause of action can be stated in a bill in equity, and by some sort of comprehensive flexibility of chancery jurisdiction relief can be administered growing out of a state of facts not embraced within the facts pleaded.

The rule that under the general prayer for relief a party may have any relief to which he may show himself entitled, is limited to relief founded on and consistent with the facts set out in the bill, and not such as may be proven at the hearing. McNair v. Bid-
dle, 8 Mo., 257; Wilkin v. Wilkin, 1 John. Ch., 111. So Napton, J., in Mead v. Knox, 12 Mo., 287, said: "It is not denied that a court may grant, under the prayer for general relief, a relief different from the specific relief sought; but the decree must be warranted by the allegations and proofs. The testimony of Mead (the witness) put a new face upon the transaction—and if there was a fraudulent combination between him and the defendant, it was proper that the bill should be modified to suit this altered state of things, but this was not asked, and the least which the court could do was to dismiss the bill without prejudice." In Duncan v. Fisher, 18 Mo., 404, Gamble, J., aptly said: "The change made in our practice does not relieve the parties from the necessity of establishing by evidence the case made in their respective pleadings, or authorize a verdict on evidence which shows a different right of recovery." In Irwin v. Chiles, 28 Mo., 576, 578, Richardson, J., declared that "a party is not entitled to a judgment on a finding of facts different from any theory of the case set up in the petition or answer." In Harris v. Railroad Co., 37 Mo., 310, Wagner, J., with emphasis, said: "The statute permits a party to amend his petition after his evidence has been given, to make it conform to the proofs; but no such thing was attempted in this case. It then presents the singular spectacle of declaring for one cause of action and obtaining judgment for another and different cause. Such a course of procedure is destructive of all certainty in pleading, and can neither be tolerated nor encouraged."

Now, what was the issue tendered by the petition and answer in the case at bar? It was simply and singly whether the plaintiff furnished the purchase money for the lot in question under the arrangement alleged, that defendant should receive the title

Prayer for relief will never take place of allegation showing right to relief.

in trust, and whether he had violated his obligation in that respect to convey to plaintiff. The evidence offered, so recites the bill of exceptions, tended to maintain the issues respectively made. And yet on this state of the pleadings and proofs the court made the decree herein quoted. The decree is based on a new and supplemental contract not embraced nor in the remotest degree referred to in the petition. Such a decree cannot be defended either on authority or principle. In principle it is little, if at all, distinguishable from *White v. Rush*, 58 Mo., 105, which was an action of ejectment. The answer put in issue the validity of the title under which plaintiff claimed, because there was no notice of the sale under the deed of trust through which the title came. Issue was taken on this new matter. The court was not content with finding the issues for defendant, but went further and adjusted the equities between the parties touching taxes, etc., which had accrued on the land, and rendered judgment for them. This court held there was nothing in the pleadings justifying the judgment, and it was, therefore, error.

How the evidence, on which the decree under review purports to be based, got before the court, is not apparent. It was not competent under the general denial for the defendant to introduce it. It was not an issue within the allegations of the petition; and as it was predicated on a state of facts supervenient, they constituted new matter which the defendant could avail himself of only by pleading them specifically in the answer. *Greenway v. James*, 34 Mo., 328; *Northrup v. Miss. V. Ins. Co.*, 47 Mo., 443, 444. If they were developed in the progress of the trial, and either party wished to avail himself of them, an application should have been made to the court for leave to amend. To the bill thus amended the defendant would have the right to plead, and quite possibly other and important questions of law might arise thereon.

Respondents' counsel suggest that the appellant ought not to complain of the error, as under the decree he obtains a half interest in the lot and improvements. But the court, whilst leaving in him an undivided interest in the property, went further, and rendered a judgment in personam against him for \$339. In other words, under a petition to impress the legal title to this property in defendant with a trust and to divest the legal title and vest it in the cestui que trust, the court, against his prayer and will, decreed that defendant have half the title, but required

him to pay plaintiff a money consideration therefor recoverable from his estate generally. This is a marked exhibition of the expansive powers of a court of equity; and I fear would be a dangerous precedent to establish. It would certainly be a case of "first impression," which would evince some unjudicial temerity to venture.

The judgment of the circuit court is reversed and the cause is remanded. All concur.

for def.

PHARIS v. GERE.

31 Hun, 443. [1884.]

Appeal from an order made at the Onondaga Circuit and Special Term, denying the plaintiff's motion to amend the complaint herein after verdict, by increasing the claim for damages therein to correspond with the verdict, and refusing to allow the plaintiff to treble the damages found by the jury, except upon the condition that he remit the excess beyond the amount of the verdict and interest thereon from the time it was rendered.

SMITH, P. J.: It has long been settled that the court will not amend the complaint after verdict by increasing the amount of damages for which judgment is demanded, without setting aside the verdict and granting a new trial, to give the defendant an opportunity to defend against the enlarged claim. Accordingly in all actions for the recovery of damages, whether sounding in tort or on contract, the sum in the conclusion of the declaration or complaint must be sufficient to cover the real demand, and it would be unjust to allow it to be enlarged after verdict without granting a new trial, as the defendant may have gone to trial relying that no more damages than the sum claimed could be recovered against him. (Pilford's case, 10 Co., 117 A, ab.; Tomlinson v. Blacksmith, 7 T. R., 128 1 Ch. Pl. (14th Am. Ed.), 339, 418; Curtis v. Lawrence, 17 Johns., 111; Dox v. Dey, 3 Wend., 356; Fish v. Dodge, 4 Den., 311; Corning v. Corning, 2 Seld., 97; Coulter v. Express Company, 5 Lans., 67; Decker v. Parsons, 11 Hun, 295.) The code has not changed the rule. (Corning v. Corning; Decker v. Parsons, supra.)

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The complaint in this action contained two counts; the first charged a forcible entry and detainer upon lands of the plain-

tiff to his damage of \$3,000, and alleged that thereby "the defendant by force of section four of the statute of 'trespass on lands' forfeited and became liable to pay treble the amount of said damages," and the same count concluded by a demand of judgment for the sum of \$3,000 besides costs. The second count alleged a forcible detainer of the same lands to the plaintiff's damage of \$3,000. The complaint concluded as follows: "Wherefore, on account of the foregoing premises, said plaintiff demands judgment against said defendant in the sum of \$3,000, besides costs of this action." At the trial the court instructed the jury that they had nothing to do with the question of treble damages, but that was for the court alone, and they were only to find the actual damages, if any, sustained by the plaintiff. The jury by their verdict found, under the first count, that there was a forcible detainer, and found for the plaintiff in the sum of \$2250. Thereupon the plaintiff moved to amend the complaint by increasing the amount claimed in the prayer thereof from \$3,000 to \$7,000, and that the amount of damages found by the jury be trebled. The court denied the motion to amend, but gave the plaintiff leave to enter an order multiplying the amount of damages found by the jury by three, upon his filing a stipulation remitting all of said sum so resulting in excess of \$3,000 and interest thereon from the date of the verdict, and to enter a judgment for said sum of \$3,000 with interest, and no more.

The order was strictly in accordance with the rule and practice of the court above stated. The complaint claimed only \$3,000 damages. The fact that the first count alleged that the defendant had become liable to pay treble damages, did not enlarge the claim for damages made at the conclusion of that count and at the conclusion of the complaint. The plaintiff having limited his claim for damages to the sum of \$3,000, could not take judgment for any greater sum, either as single or treble damages.

The motion to amend was properly denied. So far as appears, the plaintiff asked to be allowed to amend unconditionally and not upon the usual terms of paying costs and taking a new trial.

The order should be affirmed, with ten dollars costs and disbursements.

for def.

SMITH v. SMITH.

67 Kan., 841. [1903.]

Per Curiam. This was an action by the defendant in error upon a petition setting out facts which would warrant the entering of a decree for a divorce and alimony, or for alimony alone, against the plaintiff in error, then her husband. A decree for both divorce and alimony was entered. The most meritorious question raised upon the petition in error is whether under a petition whose allegations would authorize a divorce, but the prayer of which is only that alimony be allowed, a decree of divorce should be granted. It is well settled in this state that the prayer of the petition forms no part of it, and that relief may be granted in accordance with the facts stated in the petition rather than pursuant to its prayer. Smith v. Kimball, 36 Kan., 474, 13 Pac., 801; Walker v. Fleming, 37 Kan., 171, 14 Pac., 470. But it is here insisted, where the facts pleaded warrant more than one kind of relief, that plaintiff should have only such relief as he prays for; that otherwise defendant might be misled in the presentation of his evidence, not knowing the ultimate and true purpose of plaintiff in the prosecution of the action. No effort was made by the defendant to require the plaintiff to state how much of relief she was desiring. He knew from the allegations of the petition that she might obtain a divorce. He chose to go into the trial without subsequently requesting a declaration as to the extent of the relief which she desired. Besides this, we think it fairly inferable from the record that the defendant was notified that the action was one by which the plaintiff expected to obtain a divorce, and that defendant conducted his case upon that theory.

Considerable space is devoted in the brief of plaintiff in error to a discussion of the evidence and its sufficiency. All of the evidence, with its claimed contradictions, was before the trial court. He deemed it sufficient. We are not in a position to take an opposite view; indeed, we are inclined to the same conclusion.

* * *

The judgment of the lower court will be affirmed.

for plain.

Petition for both divorce and alimony, but asked for the latter Court gave both

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O'BRIEN v. FITZGERALD.

143 N. Y., 377. [1894.]

Appeal from supreme court, general term, first department.

Action by Miles M. O'Brien and another, as receivers, against Lawrence J. Fitzgerald and others, impleaded, to recover damages sustained by reason of the negligence of defendants in the management of the Madison Square Bank. From a judgment of the general term (29 N. Y. Supp., 975), affirming an order overruling the demurrer of defendant Fitzgerald, he appeals.

FINCH, J. On its face and in its form this is an action at law to recover damages for negligence. The corporation, represented by its duly-appointed receivers, sues individuals, who were its directors, for such neglect or wrong in the performance of their duties as resulted in large losses, and demands a money judgment for the damages sustained. There is no suggestion that any equitable relief is essential to a full and complete redress, and no facts are stated which indicate a need of such intervention. It is not averred that a discovery is requisite to the completeness of the remedy. On the contrary, the acts of negligence are asserted as fully known, and capable of proof. It is not alleged that an accounting is necessary to ascertain the damages, but these are claimed as a definite and fixed sum, resulting directly from the negligent acts of the defendants. It is not asserted that such defendants are severally liable for separate and personal misconduct, and in separate and different amounts, although that is a reasonable inference from the fact stated in the complaint, but it demands judgment against all and against each for the full amount claimed. The circumstance led to the interposition of a demurrer to the complaint, based upon the ground that different causes of action affecting different defendants had been improperly joined. It is not denied that the demurrer is well taken if the action is to be regarded as one at law, but the contention is that it is an action in equity, for the vindication of a trust and the protection of its beneficiaries; and that view of it has been taken by the courts below with some hesitation, and with a very obvious doubt of the consistency of our earlier rulings.

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sive of the legal or equitable character of the action. We so held in *Bell v. Merrifield*, 109 N. Y., 202, 16 N. E., 55, saying that where an answer had been interposed, and facts were stated in a complaint which "show that it is of an equitable nature, and that the cause of action is simply equitable, we do not think a case is made for trial by jury, under Code, sec. 968, merely because the complaint improperly asks for a money judgment only." That language clearly and plainly implied that a demand of judgment for money only would stamp the action as one at law, unless the facts pleaded showed an equitable cause of action simply, and that the relief asked was therefore improperly confined to a money demand merely. In other words, our doctrine was that the demand of money only, on its face and primarily, characterized the action as one at law, but not so conclusively as to prevent a different result where the action was clearly equitable rather than legal in its nature, and purely legal relief is improperly demanded. But the case before us is not of that character. The facts as pleaded show a perfect cause of action at law in favor of the receivers, as representatives of the bank, against the directors for misconduct, resulting in loss. The actual and real relation between them and the corporation is that of agents acting for their principal (*Hun v. Cary*, 82 N. Y., 65); and the directors may be sued at law for any damages caused by their culpable misfeasance or nonfeasance. Within the doctrine of the case cited, the complaint before us stated a perfect cause of action to recover damages at law, and a proper and consistent demand for a money judgment awarding such damages. In the cited case, the action was held to be of a legal character, and requires the same ruling now, unless our doctrine has changed, or some valid distinction can be drawn. In support of that idea the case of *Brinckerhoff v. Bostwick*, 105 N. Y., 567, 12 N. E., 58, is pressed upon our attention as indicating that the present action must be regarded as of an equitable character. But there is a wide and vital difference between the two cases. In this the action is by the corporation against its delinquent directors; in the other it was by a stockholder who could not sue at law, but was compelled to go into equity to obtain his relief, and whose right of action was wholly and purely of an equitable character. It may be, nevertheless, that a corporation may sue its directors in equity to recover losses sustained, for there seem to be some cases in which the remedy has been allowed. Grant-

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 ing that, and granting also, what I am not now ready to admit as the law of this state, that the facts pleaded in the present case are sufficient to support the action as an equitable one, we are left by the pleader in a doubt which can only be solved by recurring to the demand for relief. He comes into court upon a complaint which, on the concession made, pleads an ambiguous state of facts, such as may support equally an action at law or in equity, and leaving us with no means of determining which view must prevail except by reference to the relief demanded. In such a case that relief as asked must necessarily solve the doubt, because there is no other solution. The facts pleaded do not help us, for they fit equally either a legal or an equitable action, assuming the latter to be maintainable, and we are justified in relying upon the formal relief demanded to settle the point in dispute. That accords with our system of pleading, and with the distinction drawn by the Code. Where the action is for the recovery of money only, it is classed as legal, and is triable by a jury; and while we have held that we are not concluded by the formal demand of relief, but may look into the facts to see, nevertheless, if it be not equitable relief which they imperatively require, yet, where the facts do not aid us, where they are just as appropriate to a legal as an equitable cause of action, where they are ambiguous as to the subject of inquiry, we must be guided by the relief asked in reaching a conclusion. That, I think, is the situation here upon the assumption most favorable to the plaintiffs,—that upon the facts pleaded without further allegations, an equitable action could be supported. My doubt about that is very grave, although I leave the question open. If there were further allegations showing somewhere or in some way the need of equitable intervention, the difficulty would be removed. The cases of Glenn v. Lancaster, 21 Abb. N. C., 272, and of Hun v. Cary, already cited, point to this conclusion, and are not overruled or affected by Brinkerhoff v. Bostwick.

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It follows that the judgment overruling the demurrer should be reversed, and the demurrer sustained, with costs. All concur. Judgment accordingly.

for def.

BAILEY v. AETNA INS. CO.

77 Wis., 336. [1890.]

Action by Elmer Bailey and others against the Aetna Insurance Company and others who were joined with the insurance company as defendants, because they would not join as plaintiffs. From an order overruling a demurrer to the complaint, said insurance company appeals.

COLE, C. J. It seems to us that there is no room to doubt as to the nature of this action. The complaint is clearly to recover the amount due on a policy of insurance. It states what property was insured by the defendant company, the amount of the insurance, the destruction of the insured property by fire, the furnishing of proofs of loss, and demands judgment against the company for the amount of the loss, viz., the specified sum of \$928, with interest. It is a plain, ordinary action at law, upon a contract of insurance. It is true the complaint not only demands judgment for the sum just stated, but also asks judgment for costs and disbursements, "and for such other or further order, judgment, or relief as may be equitable." But this clause for other relief than a money judgment does not change the action to one equitable, nor render the complaint demurrable. This court has followed the rule, in a case of double pleading, of looking at the prayer for relief to determine the nature of the action; but that rule is one resorted to in case of actual doubt upon the facts set forth, or statements made. But there is nothing uncertain, ambiguous, or doubtful, upon the allegations of the complaint. It is a plain action at law to recover the amount due upon the policy of insurance. There may be unnecessary matter stated and relief asked not strictly legal, but this redundant matter does not vitiate the complaint, or change the character of the action. This point we deem so clear as to require no further comment. * * *

This is clearly action at law upon the facts, and hence no need of using pr for relief a criterion

SOUTH BEND PLOW CO. v. CRIBB. 7

105 Wis., 443. [1900.]

Action by the South Bend Chilled-Plow Company and others against George C. Cribb Company and others to set aside certain fraudulent conveyances, and subject the property to the claims

of creditors. A demurrer to the complaint was overruled, and defendants appeal.

Appeals from the Circuit Court for Milwaukee county, from orders overruling separate demurrers to the complaint, each grounded on the proposition that such complaint states several causes of action that cannot be properly joined. The complaint, by appropriate allegations, sets forth that each of the plaintiffs is a creditor of the defendant corporation, the George C. Cribb Company; the amount of the indebtedness as to each; that the action is brought in behalf of the plaintiffs as creditors of such corporation and of all persons similarly situated; that, after the indebtedness mentioned accrued, the officers and directors of the corporation, named as defendants, in breach of their duties as such to the corporation, wasted and misapplied its assets and converted the same to their own use and to the use of the defendant corporation, the Cribb Carriage Company, which last-named corporation is alleged to have been formed by such officers and directors in aid of a scheme formed by them to remove the assets of the George C. Cribb Company, without consideration, from its control and beyond the reach of its creditors, which scheme was carried out, leaving the debtor corporation wholly insolvent. All the various steps resorted to, to effect the scheme above stated, are set forth in the complaint, together making a good cause of action in equity at the suit of creditors, against the officers of the George C. Cribb Company and the corporation and persons who fraudulently obtained the property of such company as alleged, or some part thereof, to set aside the alleged fraudulent transfers and compel an accounting by such officers of their official management of the affairs of the corporation so far as necessary to protect the plaintiffs as creditors and protect all other persons similarly interested. The complaint contains a prayer for relief to that effect, and, in addition, for judgment against the George C. Cribb Company in favor of the South Bend Chilled-Plow Company for the amount claimed to be due to it, and similar judgments in favor of the St. Paul Plow Company and the Western Wheeled-Scraper Company respectively.

MARSHALL, J. (after stating the facts): The complaint, in all essential parts, is the same as that considered on the first appeal in this case, reported in 97 Wis., 230, 72 N. W., 749. While the question here raised was not presented for consideration there,

it was necessarily involved and was decided in reaching the conclusion upon which the decision was grounded; and the result is therefore *res adjudicata* of the same question, presented, as it now is, as the primary subject for adjudication. *Case v. Hoffman*, 100 Wis., 334, 75 N. W., 945; *Quackenbush v. Railroad Co.*, 71 Wis., 472, 37 N. W., 834; *Wells, Res. Adj.*, sec. 217. It is said that "Every proposition assumed or decided by the court, leading up to the final conclusion, and upon which such conclusion was based, was as effectually passed upon as the ultimate question which was finally solved." *Trustees v. Stoeker*, 42 N. J. Law., 115. That rule applies to a second presentation of a question in this court on demurrer to the same complaint. *Noonan v. Orton*, 27 Wis., 300; *Fire Department of Oshkosh v. Tuttle*, 50 Wis., 552, 5 N. W., 549; *Ellis v. Railroad Co.*, 80 Wis., 459, 50 N. W., 397; *Schoenleber v. Burkhardt*, 94 Wis., 575, 69 N. W., 343. On the first appeal the ground of demurrer was insufficiency of facts to constitute a cause of action. In reaching a conclusion as to that, the character of the complaint and the cause of action stated therein, if any, were necessarily considered, and the result was that the complaint stated a cause of action against the officers of the George C. Cribb Company for misuse of the property of the corporation to the injury of its creditors, and for which such creditors were entitled to relief under the statutes (sections 3237, 3239, Rev. St.). It was held that, though there were many historical matters stated in the complaint in connection with the facts essential to the purpose of the pleader, the purpose appeared with reasonable certainty to be to redress a wrong to the corporation in which the creditors were interested and for which they were entitled to a remedy in the manner sought.

Notwithstanding the foregoing, some observations on the merits of the question presented will not be out of place, and may be helpful in other cases.

As has often been said by this court, the test of whether there is more than one cause of action stated in a complaint is not whether there are different kinds of relief prayed for or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication. *Gager v. Marsden*, 101 Wis., 598, 77 N. W., 922. In every cause of action there must exist a primary right, a corresponding primary duty, and a failure to perform that duty.

The result may be, and often is, that the wronged party is entitled to several kinds of relief. The fact that, in such circumstances, in his action to enforce the right denied, the plaintiff prays for full relief, combining several elements or objects, does not render the complaint open to demurrer on the ground of multifariousness. In testing a complaint to determine whether it is single or double as regards primary rights, the different objects in view by the pleader, as indicated by the prayer for relief, are not controlling. They are of no significance whatever, except to aid in construing the allegations of the pleader and in clearing up obscurities that may exist, as to whether he intended to state facts showing a violation of distinct primary rights, or not. When there is no obscurity in that regard, the statement of facts upon which the prayer for relief is based alone speaks, and if the language shows presentation for adjudication of a single controversy, it cannot be enlarged by what follows in the prayer for relief even though it be appropriate to several distinct causes of action.

Applying what has been said to the pleading in this case, but one cause of action can be discovered which the pleader is seeking to enforce, and that is to compel the officers of the George C. Cribb Company to account, for their official conduct in the management and disposition of the funds and property of the corporation, for the benefit of its creditors. That involves, necessarily, an adjudication as to the amount of the claims of the respective creditors, whether plaintiffs or defendants, and the rights of parties who are the guilty participants with the officers of the corporation in fraudulently disposing of or wasting its property. The facts pleaded show a single cause of action, as indicated, with such clearness that the scope of the prayer for relief cannot, by any rule of construction, change it to a statement of two primary rights violated and the presentation of two primary controversies for adjudication. The result is that the orders appealed from must be affirmed.

for plain.

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X Section 3. The Union of Several Causes of Action.

CODE PROVISIONS:

Causes of action to be separately stated. "Where the complaint sets forth two or more causes of action, the statement of the facts constituting each cause of action must be separate and numbered."—*N. Y. Code Civ. Proc., Sec. 483.*

What causes of action may be joined in the same complaint. "The plaintiff may unite in the same complaint, two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

1. Upon contract, express or implied.
2. For personal injuries, except libel, slander, criminal conversation or seduction.
3. For libel or slander.
4. For injuries to real property.
5. Real property, in ejectment, with or without damages for the withholding thereof.
6. For injuries to personal property.
7. Chattels, with or without damage for the taking and detention thereof.
8. Upon claims against a trustee, by virtue of a contract, or by operation of law.
9. Upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.
10. For penalties incurred under the fisheries, game and forest law.

But it must appear, upon the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint, that they do not require different places of trial."—*N. Y. Code Civ. Proc., Sec. 484.*

Causes of action that may be united in the petition.

"The plaintiff may unite in the same petition several causes of action, whether they be such as have heretofore been denominated legal or equitable or both, where they arise out of: First,

the same transaction or transactions connected with the same subject of action; or, second, contract, express or implied; or, third, injuries with or without force, to the person and property, or either; or, fourth, injuries to character; or, fifth, claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or, sixth, claims to recover personal property, with or without damages for the withholding thereof; or, seventh, claims by or against a party in some fiduciary or representative capacity, by virtue of a contract, or by operation of law. But the causes of action so united must belong to one of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligibly distinguished."—*Mo. R. S.*, 1899, *Sec. 593*.

(a) *The Separate Statement.*

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X BAILEY v. MOSHER.

63 *Fed. (C. C. A.)*, 488. [1894.]

CALDWELL, Circuit Judge. This action was brought in the district court of Lancaster county, Neb., by Thomas Bailey, the plaintiff in error, against Charles W. Mosher, Homer J. Walsh, Rolla O. Phillips, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stewart, and Richard C. Outealt, the defendants in error, and removed into the circuit court of the United States for the district of Nebraska on the petition of the defendants, upon the ground that the suit was one arising under the laws of the United States. A motion to remand the cause to the State court was overruled, and a demurrer to the complaint was sustained, and final judgment entered for the defendants; whereupon the plaintiff sued out this writ of error, assigning for error these rulings of the circuit court. The petition alleges the plaintiff loaned the Capital National Bank of Lincoln \$11,500, and seeks by this suit to recover the same from the defendants, who were directors of the bank, upon grounds to be presently stated.

We have found it necessary to consider only two of the many questions discussed in the briefs of counsel. It is earnestly contended that this is not a suit arising under the laws of the United

*where petition contains one paragraph,
presumption is that it states only one
cause of action.*

States, but is an action for deceit, with which the national banking act has no connection.

The soundness of this contention must be tested by the averments of the petition. The petition states a single cause of action, founded wholly upon the alleged misfeasance and non-feasance of the defendants in their capacities as officers and directors of a national bank. The alleged official misconduct of the defendants which is relied upon as stating a ground of action is particularly set out. It is alleged that they made false and misleading reports as to the condition of the bank to the comptroller of the currency, by which the plaintiff was deceived and misled as to the condition of the bank; that loans were made to persons in excess of the amount which could lawfully be loaned to any one person; that they made large loans to the president and cashier of the bank, in violation of the banking act, and declared and paid dividends when there were no earnings or profits out of which to pay them; that all these acts were violations of the national banking act, and of the duties of the defendants as officers and directors of the bank under that act; and the complaint concludes with the averment that, "by reason of the several violations of the banking law as above set forth," the defendants are liable to the plaintiff in the sum sued for. In view of the last averment of the petition it is difficult to perceive how the plaintiff can successfully maintain that this cause of action does not arise under a law of the United States.

It is said in the brief of the learned counsel for the plaintiff in error that, if certain allegations of the petition state a cause of action for a violation of the national banking act, the preceding paragraphs state an independent cause of action for deceit. A petition containing a single paragraph cannot be made to subserve the purpose of two distinct and dissimilar causes of action. *Kewaunee Co. v. Decker*, 30 Wis., 624. We feel constrained to hold that, properly construed, the petition contains but one paragraph or count, and states but one cause of action, and that the cause of action stated is one for the misfeasance and mismanagement of the affairs of the bank by the defendants as its officers and directors. We cannot adopt the view of the plaintiff in error,—that those clauses of the petition which state, or tend to state a cause of action for deceit at common law, should be segregated from the other clauses of the petition, and held to constitute the statement of the cause of action. The court can-

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not reject the allegations of the petition which do state a cause of action under the banking act, for the purpose of converting mere matter of inducement or surplusage, contained elsewhere in the petition, into a substantive statement of a cause of action different from that which the petition in terms declares to be the foundation of the action.

The plaintiff was not bound to state the legal effect of the facts set out in his petition, but, having done so, he cannot complain if his adversary and the court accept and act upon his own theory. Especially is this so when the petition is ambiguous, and will support that theory as well or better than any other.

In the sense of the word, as used in code pleading, there is but one paragraph in this petition. The term "paragraph," as used in code pleading, means an entire or integral statement of a cause of action. It is the equivalent of "count" at common law. It may embrace one sentence or many sentences; but, whether one or many, it constitutes a statement of a single cause of action. It is a requirement of some codes that, if the petition contains "more than one cause of action, each shall be distinctly stated by a separate paragraph and numbered" (Code Ark., Sec. 5027); and all of them require that each cause of action shall be separately stated and numbered. The Nebraska Code provides that, "where the petition contains more than one cause of action, each shall be separately stated and numbered." Consol. St., Neb., 1891, Sec. 4633 (93). And the Supreme Court of that state, construing this section, have said: "A plaintiff cannot jumble his causes of action together." *Bank v. Bollong*, 24 Neb., 821, 40 N. W., 411. If, in drafting the petition, the pleader supposed he was stating more than one cause of action, he would undoubtedly have separately stated and numbered them, as required by the Nebraska Code. No one can point out in this petition where the statement of one cause of action ends and another begins. The plaintiff cannot reform or amend his petition in this court. If it were possible to spell out of the averments of this petition, taken separately or together, an action for deceit, the court would be precluded from attaching that meaning to them by the positive statement contained in the petition itself that the action is grounded on the "violations of the banking law" therein set out. Section 5239 of the Revised Statutes of the United States provides that:

"If the directors of any national banking association shall

Duplicity under Code means mingling of several causes of action in same count; at com. law, duplicity means stating two or more causes of action in same count.

knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. * * * And in cases of such violation, every director who participated in, or assented to, the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation."

It is obvious that the plaintiff, in the inception of this case, had in view the enforcement of the defendants' liability under the last clause of this section. Under section 2 of the judiciary act of August 13, 1888, a removal cannot be sustained upon a statement, in the defendant's petition therefor, that the suit is one arising under the laws of the United States, but that fact must appear by the plaintiff's statement of his own claim. *Tennessee v. Union & Planters' Bank*, 152 U. S., 454, 14 Sup. Ct., 654. In this cause the plaintiff's petition does disclose that the cause of action is one arising under the laws of the United States. *Tennessee v. Davis*, 100 U. S., 257, 264; *Cooke v. Avery*, 147 U. S., 375, 13 Sup. Ct., 340; *Walker v. Bank*, 5 U. S. App., 440, 5 C. C. A., 421, 56 Fed., 76.

The petition shows that the bank of which the defendants are officers and directors is insolvent, and has passed into the hands of a receiver appointed by the comptroller of the currency under the national banking act. The liability of the defendants, whatever it may be, for the acts complained of in the petition, is an asset of the bank, belonging equally to all of the creditors in proportion to their respective claims, and cannot be appropriated, in whole or in part, by a single creditor to the exclusive payment of his own claim. It is the policy of the national banking act to secure the ratable distribution of the assets of an insolvent national bank among all its creditors. Assuming that the defendants are liable in damages for the acts complained of in the petition, they are liable at the suit of the receiver, who is the statutory assignee of the bank, and the proper party to institute all suits for the recovery of the assets of the bank, of whatever nature, to the end that they may be ratably distributed among its creditors. *Rev. Statutes U. S., Sec. 5234; Kennedy v. Gibson*, 8 Wall., 498; *Bank v. Colby*, 21 Wall., 609; *Hornor v. Henning*, 93 U. S., 228; *Stephens v. Overstoltz*, 43 Fed., 771;

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Bank v. Peters, 4 Fed., 13. The law will not allow one creditor to appropriate the whole liability of the directors to his own benefit. It is well settled that an injury done to the stock and capital of a corporation by the negligence or misfeasance of its officers and directors is an injury done to the whole body of stockholders in common, and not an injury for which a single stockholder can sue. *Smith v. Hurd*, 12 Mete. (Mass.), 371; *Howe v. Barney*, 45 Fed., 668. The same rule applies to the creditors of a corporation. But it is said the plaintiff is not suing as a creditor of the bank, or for its mismanagement, but for the fraud and deceit practiced upon him through the defendants' report to the comptroller of the currency by which he alone was damaged. As we have seen, the frame of the petition will not support this contention. The motion to remand was properly overruled, and the demurrer to the petition rightly sustained, upon the ground that the plaintiff is not the proper party to sue for the cause of action stated in the complaint as we construe it. These rulings make it unnecessary to express any opinion upon the other questions so fully and ably argued by counsel. The judgment of the circuit court is affirmed.*

for def.

FAESI v. GOETZ.

15 Wis., 231. [1862.]

By the Court, PAINE, J. This was an action to foreclose a mortgage, in which a personal judgment was claimed for the deficiency. There was a demurrer for misjoinder of causes of action, and the plaintiff had judgment for the frivolousness of the demurrer.

We have several times decided such demurrers not to be frivolous, and subsequently that they were well taken, where the different causes of action did not affect all the different parties. *Walton v. Goodnow*, 13 Wis., 661; *Sauer v. Steinbauer*, 14 id., 70; *Cary v. Wheeler*, id., 281. Even if we were inclined to review our latter decision, holding the demurrer well taken, we certainly should not hold it frivolous. But the argument of counsel in this case did not change our opinion. It was based entirely on the fact that all the facts stated in the complaint were necessar-

*And so in *Booker v. Goldsborough*, 44 Ind. 490.

ily stated to establish the equitable cause of action, to bar a redemption. This being so, it was said, that as the complaint did not profess to state any second cause of action separately, therefore it must be held to state only one, although the relief demanded included a judgment both for the legal and the equitable cause of action. We think this position cannot be sustained, for the reason that although all the facts stated were necessary to the equitable cause of action, it is equally apparent that they are entirely sufficient for both causes of action. And therefore, to determine whether they were set forth for the purpose of showing both causes of action, the prayer for relief must be looked to. And this clearly shows that the intention of the pleader was to proceed for both causes of action, as has always been the practice here, until the statute providing for it was repealed. The intention being thus apparent, and the facts stated entirely sufficient to accomplish that intent, it would be allowing the pleader to take advantage of his own fault, to escape from a demurrer on the ground that he did not state the two causes of action separately.

Legal & equitable action in one

The judgment must be reversed, with costs.

for def.

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CHILDS v. BANK OF MISSOURI.

17 Mo., 213. [1852.]

Childs brought an action under the new code, alleging that the defendant had falsely accused and caused him to be accused of embezzlement, and upon this charge had unjustly and maliciously, and without probable cause, caused him to be arrested and imprisoned; that under the color of a search warrant, the defendant had obtained possession of certain valuable papers, and evidences of debt belonging to the plaintiff; that the defendant had caused the dwelling house of the plaintiff to be beset by armed men by day and by night, thus restraining the plaintiff and his family of their liberty, and interrupting their intercourse with their friends; and that the defendant had falsely and maliciously caused the plaintiff to be indicted and prosecuted; for all which grievances, the plaintiff claimed damages to the amount of fifty thousand dollars.

A demurrer to this petition was sustained, and the cause is brought to this court by writ of error.

RYLAND, Judge, delivered the opinion of the court:

* * * 2. The new code of practice says the "plaintiff may unite in his petition as many causes of action as he may have." Art. 7, § 12. The petition shall contain "a statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." Art. 6, § 1.

In New York, the code says the complaint shall contain "a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition," and the plaintiff can unite several causes of action in the same complaint, when they are of the same nature. How unite them? By mixing them up in one undistinguished and undistinguishable mass? Clearly not; reason forbids this. It needs not the results of centuries of experience to show us how inconvenient this would be. See 6 Howard's Practice, Rep. 298.

In New York, where they have greatly improved the code since it was first adopted, they require each distinct cause of action to be set down with precision and particularity; and if the plaintiff fails to make the proper statements, they will be stricken out as redundant. He is not permitted to throw the burden of analysing his complaint, and of separating the causes of action on the court; nor is the defendant required to this at his peril. See the case above cited.

Now under our statute, where the plaintiff is permitted to put in his petition as many causes of action as he may have, no matter what may be their nature or origin, there is still greater necessity for him to mark each cause distinctly; separate each cause from its neighbor with proper marks and with proper distinctness, or "the person of common understanding" may not be able to know what was intended; indeed the most acute professional mind may be at a loss to know what is intended.

These observations are necessary in order to make plaintiffs more particular and careful. We have already decided, that multifariousness and duplicity are defects under our law yet; we have not said that they can be reached by a demurrer; nor will we; but then there is a remedy for such defects.

In this case, we cannot say the action is brought to recover a *allegations of acts in aggravation, in action of trespass, are permissible.*

sum of money; nor can we call it an action for malicious prosecution, nor false imprisonment. It is one *sui generis*. It was among the first brought under our new code, and it is not to be wondered at, for really our oldest and best lawyers find themselves hesitating—pausing to know what to do.

Upon the whole of the matter set forth in the petition, it is to be seen, that if such things did take place as therein charged against the bank, its servants or agents or officers may be responsible to the persons injured, and against such the law affords a remedy.

The judgment below should, then, be affirmed, and such being the opinion of Judge SCOTT (Judge GAMBLE not sitting in this cause), it is affirmed accordingly.

for def

NATOMA MINING CO. v. CLARKIN.

14 Cal., 545. [1860.]

FIELD, C. J., delivered the opinion of the court, BALDWIN, J., and COPE, J., concurring.

The complaint in this case seeks a recovery of certain premises situated within Sacramento county, as in an ordinary action of ejectment; and also, an injunction to restrain the commission of trespass in the nature of waste, pending the action. This blending of an action at law, with a petition for ancillary relief to the equity side of the court, is admissible under our system of practice. But to prevent confusion, and preserve the simplicity and directness requisite in the averments of a complaint in an action at law, the grounds of equity interposition should be stated subsequently to, and distinct from, those upon which the judgment at law is sought. It would be the better practice, in such case, to commence that portion of the complaint which seeks equitable relief, with the form: "and for equitable relief, pending the above action, the plaintiff further represents"; or, "for a further cause of action, the plaintiff represents."

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The principal acts charged as trespasses, for the restraint of which injunction is sought, consists in cutting, destroying, and carrying away, wood, and growing timber, which are alleged to be of great value for farming, building and other purposes, and to constitute the chief value of a portion of the premises.

In the present case no question is made as to the right of the plaintiffs to an injunction upon the undenied allegations of the complaint. In our judgment the right to the preventive remedy was unquestionable. The cutting, destroying, and removing, of growing timber on the premises in controversy constituted, without other matter, sufficient ground for the issuance of the writ.

The judgment must be reversed and the cause remanded for a new trial, and the injunction must be restored until the final determination of the case, when the propriety of dissolving it, or of rendering it perpetual, will be determined according to the judgment in the ejectment.

Ordered accordingly.

HASKELL v. HASKELL.

54 Cal., 262. [1880.]

SHARPSTEIN, J.: The plaintiff, for a first cause of action, alleges that the defendant, for more than ten years next preceding the commencement of this action, was guilty of extreme cruelty toward her; and then proceeds to detail at great length a series of acts, which, if proved, would support a finding of adultery. Immediately following this narrative, in the same count, is an allegation "in further support of said charge of extreme cruelty," as the pleader styles it, "that for more than ten years past, and until now, defendant has been addicted to the use of intoxicating drinks," which caused him to be "querulous and disagreeable—often using toward plaintiff offensive language in the presence of the children; that his breath became nauseous and offensive; so that for these reasons and by reason of his intimacy" with the woman who is alleged to have been his paramour, the plaintiff with the defendant's consent ceased to lodge with him in 1871. It is further alleged in this connection, that during said ten years the defendant often appeared before the plaintiff and her children, "in a state of intoxication, and many times when he was very drunk, so much so as to hardly know what he was about," and that this occasioned the plaintiff "great mental suffering." These alone are the facts alleged in support of the charge of extreme cruelty.

That adultery or habitual intemperance would in a popular

sense constitute extreme cruelty, we do not question. And so would wilful desertion or wilful neglect. But, in a legal sense, extreme cruelty is something different from any of the other causes of divorce, and constitutes a separate and distinct cause of action. Otherwise, it would be unnecessary to specify any other cause than extreme cruelty as a ground of divorce in any case. This count seems to be framed on the theory that allegations of adulterous conduct which falls short of actual adultery, coupled with allegations of excessive drinking which does not amount to habitual intemperance, constitute a good cause of action for extreme cruelty. That theory is not supported by any authority, and we are not inclined to lend it our countenance.

On the trial, the plaintiff, by leave of the court, withdrew the charges of intimacy or association of the defendant with the woman named in the first count of the complaint; and it was suggested on the argument by respondent's counsel in this court, that the remaining allegations of that count, constitute a cause of action for divorce on the ground of habitual intemperance. But the complaint was not drawn with that view. The allegations of the same count, as to intemperance, are avowedly and expressly introduced "in further support of said charge of extreme cruelty," which is alleged to have occasioned the plaintiff "great mental suffering," and such as "would reasonably inflict a course of great mental anguish" upon her, which is a further indication that the pleader had "extreme cruelty" and not "habitual intemperance" in view. The allegations of this count are denied in the answer, and the court did not find that the defendant had been guilty of extreme cruelty.

If the count states a cause of action for extreme cruelty, there should have been a finding upon the issue raised by the answer to it. If the cause of action stated in it is not extreme cruelty, then the count is obnoxious to the objection which this court sustained to a pleading in *McAbee v. Randall*, 41 Cal., 136. Treating it, then, as the pleader intended it should be understood, as stating facts to constitute a cause of action for extreme cruelty, the judgment, in the absence of a finding of extreme cruelty, cannot be sustained upon that count.

But the pleader undertook to state another and distinct cause of action, and commences his count upon it as follows: "And for further and separate cause of complaint, plaintiff states that for more than two years next preceeding the commencement of

References from one count to another, regarding inducement, are permissible; but not references to the material allegations. But even meth-

this action, defendant has been, and still is, guilty of and addicted to intemperance," etc. In this count there is no allegation of marriage, or that the plaintiff has resided in the state for the period of six months next preceeding the commencement of the action, nor is there any reference in it to the allegations in the first count as to such marriage or residence. If this were the only count in the complaint, the objection that it does not state facts sufficient to constitute a cause of action would undoubtedly be fatal to the judgment. And in Chitty's Pl. (16th Am. Ed.) 429, it is said: "But unless the second count expressly refers to the first, no defect therein will be aided by the preceeding count; for, though both counts are in the same declaration, yet they are for all purposes as distinct as if they were in separate declarations, and consequently, they must independently contain all necessary allegations, or the latter count must expressly refer to the former." In *Barlow v. Burns*, 40 Cal., 351, this rule is recognized and approved. And in other states, whose codes contain the precise provision found in our own, that each cause of action "must be separately stated," it has been held, so far as we have observed, that each count must contain all the facts necessary to constitute a cause of action; and that its defects cannot be supplied from statements outside of it, unless expressly referred to in it; and not then, if the matters omitted relate to the gravamen of the action. Treating the allegations in the first count, as to marriage and residence, as mere matters of inducement, they should have been repeated or referred to in the subsequent count, and the omission to either repeat or refer to them is fatal; because without those allegations the complaint fails to state facts sufficient to constitute a cause of action.

We are unable to discover any other error in the record. For those above pointed out, the judgment must be reversed.

_____ for def.

+ CURTIS v. MOORE.

15 Wis., 134. [1862.]

'Appeal from an order overruling a demurrer to a complaint in an action for slander.

DIXON, C. J. * * * The complaint in this action contains three counts, charging the speaking of the slanderous words at different times and in the presence of different individuals; the

matter of inducement prior to the *colloquium* such as the pendency of the action before the justice, the calling of the plaintiff as a witness, etc., being stated only in the first. The second and third counts refer to the first. In the first, the words are charged to have been spoken *in the presence* of one Peter Sprague and divers other citizens, but the words *and hearing* are omitted. This is said to be fatal to this count. The others are not objected to. The demurrer is to the whole complaint. It is an elementary principle, that if one of several counts in a declaration be proved (although the proof of all the others should fail), the party must recover upon it, unless it be radically insufficient in law. For by maintaining *one* good count, he establishes a complete right of recovery. And for the same reason, if, on demurrer to the *whole* declaration, any one of the counts is adjudged sufficient in law, the plaintiff will be entitled to judgment on that count, though all the others be defective. } Gould's Pl., ch. IX, § 1; 1 Chitty's Pl. 664.

But it is urged that as the matters of inducement are stated in the first count only, if that be defective, the others must fail also—that no reference can be made to such inducement for the purpose of sustaining them. And we are referred to *Nelson v. Swan*, 13 Johns. 483, where it was held, on a demurrer to the whole declaration, one count being confessedly bad, reference could not be made to it for the purpose of aiding the other. It is undoubtedly true, as a general rule, that each count must stand or fall by itself, and that one cannot be helped out by the allegations of another. In that case, each count, taken by itself, was bad in substance, and the court very properly decided that they could not look to the first for the sake of supplying the defects of the second in matters relating to the gravamen of the action. But in matters of mere inducement the question is quite different. It is not only allowable, but correct practice requires, to avoid unnecessary repetition of the same matter, that in the subsequent counts reference should be made to the first, where the inducement is the same, in which case it is considered as if it were repeated in each count. 1 Chitty's Pl. 473. The first count may, therefore, fail as to the cause of action stated in it, and yet stand good as to the inducement in aid of the others. If it be conceded that the first count is bad, a question which we do not examine, the demurrer must still be overruled. * * *

Order affirmed.

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JASPER v. HAZEN.

2 North Dakota 401. [1892.]

WALLIN, J. The complaint in this action contains three causes of action, and each is separately stated. The first cause of action is voluminous, but it need not be set out in full in order to understand the questions involved in this appeal. The first cause of action is fairly summarized in appellant's brief as follows: "Plaintiff having made to defendant an absolute conveyance of his farm to secure the latter against liability as plaintiff's bail, and defendant having been fully exonerated as such bail, plaintiff thereupon became entitled to a reconveyance; but, being in jail, and unable to attend to his business affairs in person, he was persuaded to let defendant retain the title to the farm and take possession thereof, with the personal property thereon, upon trust, to take charge of, work, and operate said farm, pay off and discharge the incumbrances thereon, and, upon the expiration of plaintiff's imprisonment, to reconvey the farm, restore the personal property, and fully account to the plaintiff. It is alleged that defendant violated said trust by appropriating the subject thereof to his own use, and refusing to account; and an accounting is prayed for." The second cause of action contains a restatement of the principal facts alleged in the first, adding, however, a detailed description of the personal property which it is stated the plaintiff then had in his possession on the farm, and then intrusted to defendant's keeping, to be held in trust, as stated in the first cause of action. Such personal property consisted wholly of farm property, animals,³ and household effects then upon the farm. No note was mentioned. The personal property is alleged to be of the value of \$1,275, excluding the value of the note, and the allegation is reiterated that defendant has converted both the land and the personal property to his own use, and has failed and refused to account. As the contention turns especially upon the third cause of action, we give it in full: "For a third cause of action, plaintiff makes part thereof each and every allegation contained in the first and second causes of action herein, so far as the same set forth the promises and agreements made by and between the plaintiff and defendant, and the obligations arising therefrom; and further alleges (1) that on the said 20th day of March, 1885, plaintiff

was the owner of a promissory note theretofore executed to plaintiff by one L. M. Kimball, whereby said Kimball promised to pay the plaintiff the sum of seventy-five dollars on a certain day in the fall of the year 1885, the exact date of the maturity of which note the plaintiff does not now remember; (2) that at the said time the said note was in the possession of Fuller, Johnson & Co., and, after plaintiff's removal to the penitentiary, defendant, by means unknown to plaintiff, obtained possession of said note, and collected the amount thereof from said Kimball, and converted the same to his own use, to plaintiff's damage seventy-five dollars; (3) that prior to the commencement of this action plaintiff demanded of the defendant the said money so collected, but that defendant refused to pay the same or in any wise to account therefor to plaintiff." The prayer is that defendant be required to account for the proceeds of the farm, and also for the proceeds of the personal property, including the note, with interest. The following details, which also appear by the complaint, may here be conveniently grouped, viz.: That the deed of plaintiff's farm was delivered to defendant on March 20, 1885, that the trust agreement was entered into on April 20, 1885; that the farm and farm property before mentioned was, in furtherance of the trust, turned over to the defendant on May 20, 1885. The plaintiff was convicted and sent to the penitentiary in June, 1885, and he was not released until March, 1888. Defendant demurred to the complaint, setting up the following ground: "That it appears upon the face of the complaint that several causes of action have been improperly united therein, to-wit: a cause of action against said defendant in the character of trustee for an accounting, and a cause of action at law against said defendant for the conversion of a promissory note." The district court overruled the demurrer, and the defendant appealed from its order, and assigns it as error.

The single question for determination is whether the acts and transactions of the defendant in relation to the \$75 note, which are stated separately as the third cause of action, are properly united in the same complaint with those other matters and transactions which are set out in the first and second causes of action. The matters set out in the first and second causes of action are confessedly and clearly of a character which involve a relation of trust between the parties to the action, and hence, as

was held by this court on a former appeal of this action, such matters must be heard and disposed of by a court of equity, and not by a court of law. 44 N. W. Rep. 1018; 1 N. Dak. 75. All of the claims of the plaintiff against the defendant, as stated in the first and second causes of action, are clearly such as may be united in one complaint against a trustee as such. Subdivision 7, § 136 Code Civil Proc. (Comp. Laws, § 4932,) expressly provides that several causes of action may be united in a complaint where they are "claims against a trustee by virtue of a contract, or by operation of law." From this it appears that only such claims as are against "a trustee" can be united in an action against a trustee, as such. It follows that unless the \$75 note transaction is a claim against the defendant as a trustee, it cannot be united in the same action with the other claims against the defendant in that capacity. If the facts, as pleaded in the third cause of action show a trust relation with respect to the \$75 note transaction, whereby a claim in plaintiff's favor against the defendant as trustee is established, then it follows that the third cause of action is properly united with the others; otherwise such note transaction is improperly united. We are entirely clear that the facts pleaded as a third cause of action do not show a claim against the defendant as trustee. * * *

* * * Counsel further argues that the first paragraph of the third cause of action carries forward and incorporates with that cause of action all allegations in the first and second causes of action, "so far as the same set forth the promises and agreements made by and between plaintiff and defendant, and the obligations arising therefrom." As already shown, there are no averments of the complaint connecting the note transaction with any trust between the parties; but we deem it proper to add that the language quoted above cannot, under the rules of pleading, operate to make any allegations of the first and second causes of action a part of the third. Each cause of action must be complete in itself, but some courts permit a reference to be made to distinct allegations or separate paragraphs in a preceding cause of action, where the same embody distinct averments of fact, and by such reference reallege the same facts in a later cause of action. This is perhaps the better rule. It appears to be the rule in New York. *Simmons v. Fairchild*, 42 Barb. 404; *Manufacturing Co. v. Beecher*, 55 How. Pr. 193. But a recent case in California is strongly adverse to such a rule.

Pennie v. Hildreth (Cal.) 22 Pac. Rep. 398. But no authority can be found which will support the language in question as a proper mode of alleging a fact by reference to the preceding parts of the complaint. The reference does not point out any particular averment, paragraph, or part of the complaint by number, page, or otherwise; but it leaves court and counsel to explore the voluminous matter referred to in quest of "promises and agreements," and, if any promises and agreements are found, then to scrutinize the same closely in quest of "obligations" arising thereon. It is obvious that such a vague reference to preceding parts of the complaint is quite ineffectual to point out any particular averments of fact which the pleader desires to reallege as a part of the third cause of action; and consequently the first paragraph of the third cause of action must be eliminated, or not considered, as an additional averment of fact. But this in no way affects the disposition of the case, for, as has been seen, we should reach the same conclusion if all of the preceding parts of the complaint were restated in the third cause of action. Our view of the case will render necessary the framing of a new complaint; and to avoid further delays, occasioned by mistakes of procedure, we now take occasion to suggest that in our opinion the series of transactions which are set out in the first and second causes of action (while they include matters relating to both real estate and personal property, and the title and management of both) form only a single trust arrangement, and the refusal to account gives rise to only a single cause of action or claim against the defendant as trustee. If it be true, by reason of existing facts which are not alleged in the complaint before us, that the note was taken possession of by defendant under color of the trust arrangement set out in the first and second causes of action, then the note matter can be investigated as an item in that trust arrangement, despite the fact that the note may not have been delivered to the defendant with the other trust property. In no event should the note matter be pleaded as an independent cause of action against the defendant as trustee, unless the note transaction, by reason of its own peculiar facts, gives rise to a distinct and separate trust, and thereby becomes the source of an independent claim against the defendant in his fiduciary capacity. The assignment of error is sustained, and the order of the district court must be reversed. All concur.

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(b) *What Are Separate Causes of Action?*

X SECOR v. STURGIS.

16 N. Y. 548. [1858.]*

STRONG, J. It is not controverted that the account, the amount of which is sought to be recovered in this action, was due to the plaintiffs, and a lien on the vessel, at the time of the application for the attachment, and also at the time of the execution of the bond on which this action is founded; but it is insisted that the said account, and the account for which judgment was recovered in the district court of the United States, together, constituted a single cause of action, and that the judgment for part of it is a bar to a recovery in this action for the residue. The answer does not in express terms, allege that the cause of action in the suit in the district court was the same as that in the present suit, but it was treated in the reply as containing substantially that allegation, and must therefore be so regarded by the court. It was essential, in order to present the question raised, that the identity of the cause of action in the different suits should, in some form, be averred in the answer. (3 Chit. Pl. 928-9; *Philips v. Berick*, 16 Johns. 137, 140.)

The principle is settled beyond dispute that a judgment concludes the rights of parties in respect of the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits. (*Farrington v. Payne*, 15 John. 432; *Smith v. Jones*, id. 229; *Philips v. Berick*, 16 id. 137; *Miller v. Covert*, 1 Wend. 487; *Guernsey v. Carver*, 8 id. 492; *Stevens v. Lockwood*, 13 id. 644; *Colvin v. Corwin*, 15 id. 557; *Bendernagle v. Cocks*, 19 id. 207, and cases there cited.) But it is entire claims only which cannot be divided within this rule, those which are single and in-

*The statement has been omitted.

divisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes, the prosecution of several actions upon several causes of action. The holder of several promissory notes may maintain an action on each; a party upon whose person or property successive distinct trespasses have been committed may bring a separate suit for every trespass; and all demands, of whatever nature, arising out of separate and distinct transactions, may be sued upon separately. It makes no difference that the causes of action might be united in a single suit; the right of the party in whose favor they exist to separate suits is not affected by that circumstance, except that in proper cases, for the prevention of vexation and oppression, the court will enforce a consolidation of the actions.

It is not, as will be seen by the cases, always easy to determine whether separate items of claim constitute a single or separate cause of action; and this difficulty, connected with neglect, in some instances, of proper attention to the principle of the rule under consideration, has led to some loose expressions and confusion in the books on this subject. *Farrington v. Payne* was a plain case of an indivisible cause of action. A bed and bed quilts were taken at the same time, and by the same act, and a recovery in trover for the quilts was held a bar to a recovery in trover for the bed. In *Smith v. Jones*, actions were brought for goods sold and delivered, the plaintiff, in one, claiming to recover for one barrel of potatoes, and in the other for two barrels of the same article, all sold at the same time. The court held that the demand could not be divided into separate suits. This was also a plain case of one cause of action. *Miller v. Covert*, in which the same rule was applied, was a case of a sale of hay, under a contract, delivered in parcels. The demand was held to be entire and indivisible.

In *Guernsey v. Carver*, the plaintiff declared on a book account consisting of items of merchandise delivered between the 20th of July and the 27th of August, 1828, amounting to \$2.35. The defendant pleaded a former suit for the same identical cause and causes of action. It was proved in the Common Pleas that the plaintiff had an account against the defendant, consisting of twenty different articles of merchandise, delivered on fourteen different days between the 4th of June and the 27th of August, 1828, amounting to between \$5 and \$6; that he com-

menced a suit against the defendant, and exhibited an account of items delivered between the first of June, and the 19th of July, 1828, amounting to 274, that the defendant pleaded a tender in such suit, and obtained judgment for costs. The plaintiff then sued for the balance of such account, viz., for items delivered between the 20th of July and the 27th of August. The common pleas decided that on a running account, where no special contract was made at the commencement of the account, and where items have been delivered on such account at different times, without any intermediate agreement, each separate delivery formed a separate and distinct cause of action, and that separate suits might be maintained on each separate delivery; and the plaintiff recovered judgment. On appeal to the supreme court the judgment was reversed. The court, by Nelson, J., after stating that it was settled in that court that if a plaintiff bring an action for a part only of an entire and indivisible demand, the judgment in that action is a conclusive bar to a subsequent suit for another part of the same demand, says: "This case comes within the reason and spirit of that principle. The whole account being due when the first suit was brought, it should be viewed in the light of an entire demand, incapable of division, for the purpose of prosecution. The law abhors a multiplicity of suits. According to the doctrine of the court below, a suit might be sustained, after the whole became due, on each separate item delivered, and if any division of the account is allowable it must no doubt be carried to that extent. Such a doctrine would encourage intolerable oppression upon debtors, and be a just reproach upon the law. The only just and safe rule is to compel the plaintiff, on an account like the present, to include the whole of it due in a single suit." The reasoning of the learned justice would make every account consisting of different items, the whole of which is due, an entire demand incapable of division for the purpose of prosecution irrespective of every other consideration. It excludes the idea that it is necessary the claims should have arisen out of a single transaction, or be connected together by contract. This, in my opinion, is carrying the doctrine in question far beyond its just limits. *Stevens v. Lockwood* was a case similar to the last, and decided upon similar views. These cases may have been rightly decided, but I cannot assent to all the reasons given for the decisions.

In *Colvin v. Corwin*, two suits were brought for lottery tick-

ets sold the defendant. On the trial of the first the defendant admitted he had bought the tickets alleged to have been sold to him, and judgment was rendered for the plaintiff. The judgment was set up as a bar in the second suit, and on the trial it appeared that the tickets claimed in the suits were delivered to the defendant by two different agents of the plaintiff, at different offices occupied by them, at different times, and it was held by the Supreme Court that the previous judgment was a bar to a recovery. It is manifest that this decision rests on no sound principle, and is not law. A plainer case of distinct independent causes of action could hardly be presented.

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Bendernagle v. Cocks, was an action for breaches of certain covenants contained in an indenture of lease. A plea in abatement was interposed of an action pending upon the same lease for the alleged breach by the defendant of covenants therein. It is stated in the reporter's note, that all the causes of action had accrued at the time of the bringing of the first action. The plaintiff replied that the covenants, for the breach of which the first suit was brought, were other, distinct and different from the covenants for the breach of which the second suit was brought. The defendant demurred, and the common pleas overruled the demurrer, but the supreme court reversed the judgment. Cowen, J., who delivered the opinion of the court, reviews and comments upon many of the cases, after which he makes the following observation: "I admit that the rule does not extend to several and distinct trespasses or other wrongs, nor, as we have seen, to distinct contracts. It goes against several actions for the same wrong, and against several actions on the same contract. All damages accruing from a single wrong, though at different times, make but one cause of action, and all debts or demands already due by the same contract make one entire cause of action. Each comes under the familiar rule that if a party will sue and recover for a portion, he shall be barred of the residue. Proof of that fact would sustain the common issue presented in Bagot v. Williams, that the plaintiff had before impleaded the defendant, and recovered for the same identical cause of action," etc.

The true distinction between demands or rights of action which are single and entire, and those which are several and distinct is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or con-

tracts. Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or implied, each contract affords one and only one cause of action. The case of a contract containing several stipulations to be performed at different times is no exception; although an action may be maintained upon each stipulation as it is broken, before the time for the performance of the others, the ground of action is the stipulation which is in the nature of a several contract. Where there is an account for goods sold, or labor performed, where money has been lent to or paid for the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exist, will, in each case, depend upon whether the case is covered by one or by separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods, or perform work, or advance money; and usually, in the case of a running account, it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued, either for a definite period or at the pleasure of one or both of the parties. But there must be either an express contract, or the circumstances must be such as to raise an implied contract, embracing all the items, to make them, where they arise at different times, a single or entire demand or cause of action.

Applying this test to the present case, it is very clear that the two accounts did not constitute an entire claim; but, on the contrary, that they were several and formed two several causes of action. The business of the plaintiffs consisted of two branches, which were designed to be and were kept entirely distinct, in each of which one of the accounts was made, and an arrangement was entered into under which one of the accounts arose anterior to the opening of the other account. Here was no express contract connecting the two accounts; and the facts, instead of warranting the presumption of such a contract, show that separate agreements only, one in regard to each account, were intended. * * *

Judgment affirmed.

for plain

BRUNSDEN v. HUMPHREY.

14 Q. B. D. 141. (C. A.) [1884.]*

Appeal of the plaintiff against an order of the Queen's Bench Division making absolute a rule to enter judgment for the defendant.

BOWEN, L. J. The plaintiff in this case has recovered a verdict and £350 damages for personal injuries sustained by him through the negligence of the defendant's servant in driving a van, which had come into collision with the plaintiff's cab, thrown the plaintiff from the box and seriously injured him in his legs. Previously to bringing the action the plaintiff had sued the defendant in the county court for damages done to his cab in the collision, and the particulars delivered under his plaint had been confined to the damage which the cab had sustained. The defendant in the county court action paid £4 3s into court together with 6s costs, upon which the plaintiff had discontinued the county court plaint. The present action was now brought in the high court for personal injuries, of the importance and extent of which the plaintiff alleged that he had been ignorant of at the time of the county court proceedings. On a motion for a new trial the court below have entered a judgment for the defendant on the ground that the recovery of damages in respect of the cab in the county court is a bar to any further action for injury to the plaintiff's person. The rule of the ancient common law is that where one is barred in any action real or personal by judgment, demurrer, confession or verdict, he is barred as to that or the like action of the like nature for the same thing forever. "It has been well said" (says Lord Coke in a note to Ferrer's case, 6 Coke, 9 a), "interest republicæ ut sit finis litium, otherwise," says Lord Coke "great oppression might be done under color and pretence of law;" (see also Sparry's case (5 Coke, 61 a): Higgin's case (6 Coke 45 a); Year Book, 12 Edw. IV, p. 13, 10.) Accordingly in Hudson v. Lee (4 Coke 43 a), it was held to be a good plea in bar to an appeal of mayhem, that the appellant had recovered damages in an action for trespass brought for the same assault, battery, and wounding. So in Bird v. Randall (3 Burr. 1345) it was decided to be an an-

*The opinion of Brett, M. R., and the dissenting opinion of Lord Coleridge have been omitted.

swer to an action for seducing a man's servant from his service, that penalties had previously been recovered by the master, in satisfaction of the injury done him. So too in *Phillips v. Berryman* (3 Doug. 287), a recovery in replevin was held to be a good bar to an action on the statute of Marlbridge for an excessive distress, on the ground that the plaintiff had already had his remedy, and that a recovery in one personal action is bar to all other personal actions on the same subject. The principle is frequently stated in the form of another legal proverb, *nemo debet bis vexari pro eadem causa*. It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit. "The principal consideration," says De Grey, C. J., in *Kitchen v. Campbell* (2 W. Bl., 827), "is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case." "And one great criterion," he adds, "of this identity is that the same evidence will maintain both actions." See per Lord Eldon in *Martin v. Kennedy* (2 B. & P., 71). "The question," says Grose, J. in *Sedon v. Tutop* (6 T. R., 607) "is not whether the sum demanded *might have been* recovered in the former action, the only inquiry is whether the same cause of action *has been* litigated and *considered* in the former action." Accordingly "though a declaration contain counts under which the plaintiff's whole claim might have been recovered, yet if no attempt was made to give evidence upon some of the claims, they might be recovered in another action." *Thorpe v. Cooper* (5 Bing., 129). It is evident therefore that the application of the rule depends, not upon technical consideration of the identity of forms of action, but upon matter of substance.

I have now to consider the application of the above doctrine to the case of the present action; and the question to be decided is whether the damage done by the negligent driving of the defendant's servant to the plaintiff's cab is in substance the same cause of action as the damage caused by such negligence to the plaintiff's person. Nobody can doubt that if the plaintiff had recovered any damages for injury to his person, he could not have maintained a further action for fresh bodily injuries caused

by the same act of negligence, merely because they had been discovered or developed, subsequently, see *Fetter v. Beale* (1 Ld. Raym., 339). "The jury," says the court in that case, "have in the former action considered the nature of the wound and given damages for all the damage that it had done to the plaintiff." This authority however leaves still open the point I now have to determine, whether the cause of action arising from damage to the plaintiff's cab is in substance identical with that which accrues in consequence of the damage caused to his person. In order clearly to elucidate this question, let me assume for the sake of argument that the damage had been caused by some act of the defendant himself and not merely an act of his servant. According to the old distinctions of forms of actions which still have a historical value as throwing light upon the principles and definitions of the common law, the form of action upon such an hypothesis would have been trespass to the person for the personal injury, trespass to goods for the damage to the vehicle. Injury would have been done to the plaintiff in respect of two absolute and independent rights, the distinction between which is inveterate both in English and in the Roman law. Everyone in this country has an absolute right to security for his person. Everybody has further an absolute right to have his enjoyment of his goods and chattels unmeddled with by others. In the hypothetical case I am assuming both these rights would have been injured, and though the two injuries might have been combined in one suit, could it have been said that the subject matter of each grievance was the same? Applying the test of identity furnished by De Grey, C. J., in *Kitchen v. Campbell* 2 W. Bl., 827), the first matter that is obvious is, that the same evidence would not have supported an action for trespass to the person and an action for the trespass to the goods. (1) In the one case the identity of the man injured and the character of his injuries would be in issue, and justifications might conceivably be pleaded as to the assault, which would have nothing to do with the damage done to the goods and chattels. (2) In the other case the plaintiffs' title to the goods might have been in issue in addition to the question of the damage done to them. (3) Different provisions of the statute of limitations might possibly have applied in each case. And finally, (4) the damage in one case might have been directly due to the wrongful act complained of, in the other case it might not. There is no authority so far as I

know in the books for the proposition, that a recovery in an action for a trespass to the person would be a bar to the maintenance for a trespass to goods committed at the same time. In the present instance, as the defendant himself was not driving but his servant, trespass would not have lain under the old law, and the plaintiff's remedy would have been in an action on the case for negligence, based on the negligent management by the servant of his master's horses, a negligence for which in the eye of the law the master or employer is responsible. Now what is the gist of such an action on the case for negligence? If the whole of the plaintiff's case were to be stated and the entire story told, it seems to me that it would have comprised two separate or distinct grievances, narrated, it is true, in one statement or case. Actions for the negligent management of any animal, or any personal or moveable chattel, such as a ship or machine, or instrument, all are based upon the same principle, viz., that a person, who, contrary to his duty, conducts himself negligently in the management of that which contains in itself an element of danger to others, is liable for all injury caused by his want of care or skill. Such an action is based upon the union of the negligence and the injuries caused thereby, which in such an instance will as a rule involve and have been accompanied by specific damage. Without remounting to the Roman law, or discussing the refinements of scholastic jurisprudence, and the various uses that have been made, either by judges or juridical writers, or the terms "injuria" and "damnum," it is sufficient to say that the gist of an action for negligence seems to me to be the harm to persons or property negligently perpetrated. In a certain class of cases the mere violation of a legal right imports a damage. "Actual perceptible damage," says Parke, B., in *Emery v. Owen* (6 Ex., 353, at 368), "is not indispensable, as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage." But this principle is not as a rule applicable to actions for negligence, which are not brought to establish a bare right, but to recover compensation for substantial injury. "Generally speaking," says Littledale, J., in *Williams v. Morland* (2 B. & C., 916), "there must be temporal loss or damage accruing from the wrongful act of another in order to entitle a party to maintain an action on the case;" see *Fay v. Prentice* (1 C. B., 835), per Maule, J.

This leads me to consider, whether in the case of an accident

It is not the one particular act which constitutes one cause of action, it is the number of different rights invaded by that particular act which constitutes the various causes of action.

caused by negligent driving, in which both the goods and the person of the plaintiff are injured, there is one cause of action only or two causes of action which are severable and distinct. This is a very difficult question to answer, and I feel great doubt and hesitation in differing from the judgment of the court below and from the great authority of the present chief justice of England. According to the popular use of language, the defendant's servant has done one act and one only, the driving of the one vehicle negligently against the other. But the rule of law, which I am discussing, is not framed with reference to some popular expressions of the sort, but for the sake of preventing an abuse of substantial justice. Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in one sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse, not the act of driving, which (if no damage had ensued) would have been legally unimportant. It certainly would appear unsatisfactory to hold that the damage done in a carriage accident to a man's portmanteau was the same injury as the damage done to his spine, or that an action under Lord Campbell's act by the widow and children of a person who has been killed in a railway collision, is barred by proof that the deceased recovered in his lifetime for the damage done to his luggage. It may be said that it would be convenient to force persons to sue for all their grievances at once and not to split their demands; but there is no positive law (except so far as the county court acts have from a very early date dealt with the matter), against splitting demands which are essentially separable (see *Seddon v. Tutop* [6 T. R., 607]), although the high court has inherent power to prevent vexation or oppression, and by staying the proceedings or apportioning the costs, would have always ample means of preventing any injustice arising out of the reckless use of legal procedure. In the present case the plaintiff's particulars in the

county court were confined to the damage done to his cab; the injury to his person, therefore, was neither litigated nor considered in the county court. The real test is not, I think, whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second (see *Seddon v. Tutop*, [6 T. R., 607]). With all respect, I do not see how it can be said that *Nelson v. Couch* [15 C. B., (n. s.) 99] so decides. That case establishes only the converse rule, viz., that the maxim "Nemo debet bis vexari" cannot apply where in the first action the plaintiff had no such opportunity of satisfying his claim. The language of Coleridge, J., and the other members of the court in *Hodsoll v. Stallbrass* (11 A. & E., 305), must, I think, be read by the light of the special circumstances of that case; and so read is not inconsistent with the view at which I have here arrived. I am in no way departing from the language of this authority in holding, as I do in the present instance, that the damage, for which the plaintiff is now suing, accrues from a different injury, and therefore a different wrong, from that for which he recovered damages in the county court. The view at which I have arrived, is in conformity with the reasoning of the judgment recently pronounced by this court in the case of *Mitchell v. Darley Main Colliery Co.* (14 Q. B. D., 125), where it was held, reversing *Lamb v. Walker* (3 Q. B. D., 389), that each fresh subsidence of soil in the case of withdrawal of support gave rise to a fresh cause of action. Nor do I feel called upon to extend the application of the sound and valuable principle of law, that none shall be vexed twice for the same cause of action, to a case to which it has never yet been applied, and to which it can only be applied by pursuing analogy to lengths which would involve practical injustice. The present case is one which I am conscious that lawyers of great authority do differ and will differ. But on the whole, in my opinion, the judgment of the Queen's Bench Division ought to be reversed, and the judgment entered at the trial for the plaintiff be restored with costs to the plaintiff, including the costs below and of this appeal.

for plain. *Judgment reversed.*

KING v. C., M. & ST. P. RY. CO.

80 Minn., 83. [1900.]

LEWIS, J. Plaintiff, while riding in and driving his wagon across the defendants' tracks, was run into by defendant's train. As a result, he was personally injured, and the wagon and harness and horses were injured. Thereafter plaintiff brought an action against defendant to recover for the injuries suffered in his person, and secured a judgment for \$1,000. While that action was still pending on appeal in this court (79 N. W., 611), plaintiff commenced the present proceeding to recover the damage sustained by the injury to the harness, wagon and horses, alleged to be \$225. As a defense to this action, defendant pleaded the former judgment as a bar, and, by an amendment later, pleaded its full payment and satisfaction. Upon the trial below, judgment was rendered for the full amount, and defendant appeals.

This brings before us a question new to this court, viz: Where the person himself and his personal property are injured by the same tortious act, does there arise only one cause of action for damages, or is there one separate and independent cause of action for injuries to the person, and another for damages to the property? It has long since become settled in this state that a single, entire cause of action cannot be split up into several suits, and that one recovery, although it be in part recovery for the entire injury, is effectual as an estoppel. *Pierro v. Railway Company*, 39 Minn. 451, 40 N. W. 520; *Thompson v. Myrick*, 24 Minn. 4; *Ziebarth v. Nye*, 42 Minn. 541, 44 N. W. 1027; *O'Brien v. Manwaring*, (Minn.) 81 N. W. 746. Mr. Dunnell, in his new work, *Minnesota Pleading*, (sections 285, 286), defines a cause of action and quotes from *Pomeroy on Remedies*: "Every remedial right arises out of an antecedent primary right and a corresponding duty, and a delict or breach of such primary right and duty by the person on whom the duty rests. Every judicial action must, therefore, involve the following elements: A primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant, which consisted in a breach of such primary right and duty; a remedial right in favor of the plain-

tiff, and a remedial duty resting on the defendant, springing from this delict; and finally the remedy itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong, combined, constitute the cause of action." The learned trial judge, in a carefully written memorandum, based his decision upon the proposition that at the common law every person was possessed of two distinct primary rights,—the right of personal security and the right of private property,—and that a distinct cause of action arose from an infringement of either. And, it is argued, these rights have been carried into our system of jurisprudence, and remedies provided for their preservation; that the constitution guarantees a certain remedy by the law for injuries thereto; that statutes have been enacted with the special purpose of keeping these rights separate and distinct, in order that the remedy for an infringement of each may be enforced without reference to the other, as the statute of limitations (Gen. Sts. 1894, §§ 5136-5138;) also, the statute providing what causes of action survive. Counsel for respondent, taking this distinction of primary right as a basis, has argued ably that it necessarily follows that the cause of action in this case did not consist of the act of negligence on the part of the defendant in injuring the plaintiff and his property, but the cause of action arose from the results of the act; that instantly upon the striking and throwing of plaintiff by the engine the cause of action arose for injury to his person, and another cause arose as soon as plaintiff's enjoyment of his property was interfered with. The leading case in favor of respondent's position arose in the English Courts. *Brunsdon v. Humphrey*, 14 Q. B. Div. 141. In that case a cabman had been run into by another vehicle, causing injury to the cabman and his cab. The court held that he might maintain two separate actions: "Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all; for it was not a wrongful act at all till a wrong rose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes, of action, in one sense, may be said to be founded upon one act of defendant's servant.

Brunsdon v. Humphrey
caused.

Strict analysis would give plain a cause of action for each right invaded, and hence plain. would have a separate action for each chattel injured:

but they are not on that account identical causes of action." But the refined reasoning of this part of the opinion is destroyed by the common sense, practical argument of Chief Justice Coleridge in a dissenting opinion: "It appears to me that whether the negligence of the servant, or the impact of the vehicle which the servant drove, be the technical cause of action, equally the cause is one and the same. That the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act, in respect of different rights (i. e., his person and his goods), I do not in the least deny; but it seems to me a subtlety not warranted by law that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two if, besides his arm and leg being injured, his trousers which contain his leg, and his coat sleeve which contains his arm, have been torn." In *Watson v. Railway Co.*, (Tex. Civ. App.) 27 S. W. 924, the court held that two causes of action arose where the same act caused the injury to the person and the property; placing the decision on the exception noted in 2 Black. Judgm. § 740, viz., that, where there is an infringement of different rights, separate causes of action follow. But the only case cited in the text is the English case above noted. On the other hand, the principle contended for by appellant has been accepted in Massachusetts (*Doran v. Cohen*, 147 Mass. 342, 17 N. E. 647; *Bliss v. Railroad Co.*, 160 Mass. 447, 36 N. E. 65); also, in New York, in the case of *Reilly v. Paving Co.*, (Sup.) 52 N. Y. Supp. 817. We are of the opinion that the cause of action consists of the negligent act which produced the effect, rather than in the effect of the act in its application to different primary rights, and that the injury to the person and property as a result of the original cause gives rise to different items of damage. The natural rights mentioned in the constitution and statutes are of a personal character, all centering in the person; and the enactments referred to are intended to preserve them under the various phases of life, in the most practicable manner, as viewed by the legislature. But, because the distinction in reference to personal and property rights has been made, as noticed by respondent, it does not follow that those statutes were intended to definitely provide for separate remedies under the circumstances presented in this case. Our attention has been called to the case of *Skoglund v. Railway Co.*, 45 Minn. 330, 47 N. W. 1071, 11 L. R. A.

ferent items.

So in case of personal & property actions, we get two causes of action on analysis, & there is not same reason for multiple damages as for the two

222.* We cannot accept the reasoning of the court in that case as applicable to the one before us. The facts were different, and it is not necessary at this time to review it. The rule there applied should certainly not be extended. The views we have adopted seem to us more in harmony with the tendency toward simplicity and directness in the determination of controversial rights. That rule of construction should be adopted which will most speedily and economically bring litigation to an end, if at the same time it conserves the ends of justice. There is nothing to be gained in splitting up the rights of an injured party as in this case, and much may be saved if one action is made to cover the subject. Judgment reversed.

REILLY v. SICILIAN ASPHALT PAVING COMPANY.

170 N. Y. 40. [1902.]

*and
treatment
the
action,
of E. W. H.*

CULLEN, J. The appellant claimed that while driving in Central Park, in the city of New York, both his person and his vehicle were injured in consequence of collision with a gravel heap placed on the road through the negligence of the defendant. Thereupon he brought an action against the defendant in the court of common pleas to recover damages for the injury to his person. Subsequently he brought another action in one of the district courts of the city of New York to recover for the injury to his vehicle. In this last action he obtained judgment which was paid by the defendant. Thereafter the defendant set up by supplemental answer the judgment in the district court suit and its satisfaction as a bar to the further maintenance of the action in the common pleas. On the trial of the case in the supreme court, to which, under the constitution, the action was transferred, it was held that the plaintiff's right of action was merged in the judgment recovered in the district court, and his complaint was dismissed. The judgment entered upon this direction was affirmed by the appellate division, and an appeal has

*In Skoglund v. Ry., 45 Minn. 330, the plaintiff and his wife had been injured in the same accident. In an action for the loss of his wife's services it was held that his former recovery for his personal injuries constituted no defense.

of action should not be combined:-
 1) Stat. of him is different for personal
 a property injuries.
 2) Property cause of action assignable,

been taken to this court by allowance. The rule is that a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon. *Secor v. Sturgis*, 16 N. Y. 548; *Nathans v. Hope*, 77 N. Y. 420. As to this principle there is no dispute. Therefore the question presented by his appeal is whether, from the defendant's negligence, and the injury occasioned thereby to the plaintiff in his person and his property, there arose a single cause of action, or two causes of action, one for the injury to his person, and the other for injury to his property. The question is not determined by the code of civil procedure, for, though in section 484 it prescribes what separate causes of action may be joined in the same complaint, it nowhere assumes to define what is a single cause of action. Nor is there any controlling decision of this court on the point. In *Mulligan v. Ice Co.*, (affirmed without opinion) 109 N. Y. 657, 16 N. E. 684, the question discussed in the opinion of the learned court below, and necessarily involved in the decision of this court, was the effect of a release which the plaintiff asserted was intended to cover only the injuries to his property, but was fraudulently prepared so as to embrace his whole cause of action. The case is doubtless authority for the proposition that the voluntary settlement between the parties of a part of a claim does not satisfy or discharge the whole claim. But the principle that the parties may, by a voluntary agreement, sever or spilt up a single cause of action, though a plaintiff cannot of his own volition do the same, seems to be generally recognized even in those jurisdictions where the rule is held most firmly that a single tort gives rise to but a single cause of action. *O'Beirne v. Lloyd*, 43 N. Y. 248; *Bliss v. Railroad Co.*, 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504.

The question now before us has been the subject of conflicting decisions in different jurisdictions. In England it has been held by the court of appeal (Lord Coleridge, C. J., dissenting) that damages to the person and to property, though occasioned by the same wrongful act, give rise to different causes of action (*Brunsdon v. Humphrey*, 14 Q. B. D. 141), while in Massachusetts, Minnesota and Missouri, the contrary doctrine has been declared: (*Doran v. Cohen*, 147 Mass. 342, 17 N. E. 647; *King v. R. R. Co.* [Minn.] 82 N. W. 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238; *Von Fragstein v. Windler*, 2 Mo. App. 598.) The argument of those courts which maintain that an injury to per-

*not certain how the courts
would decide; only one case, &
not not conclusive.*

son and property creates but a single cause of action is that, as the defendant's wrongful act was single, the cause of action must be single, and that the different injuries occasioned by it are merely items of damage proceeding from the same wrong, while that of the English court is that the negligent act of the defendant in itself constitutes no cause of action, and becomes an actionable wrong only out of the damage which it causes. "One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person." *Brunsdon v. Humphrey, supra*. I doubt whether either argument is conclusive. If, where one person was driving the vehicle of another, both the driver and the vehicle were injured, there can be no doubt that two causes of action would arise—one in favor of the person injured, and the other in favor of the owner of the injured property. On the other hand, if both the horse and the vehicle, being the property of the same person, were injured, there would be but a single cause of action for the damage to both. If, while injury to the horse and vehicle of a person give rise to but a single cause of action, injury to the owner and vehicle gives rise to two causes of action, it must be because there is an essential difference between an injury to the person and an injury to property, that makes it impracticable, or at least very inconvenient, in the administration of justice, to blend the two. We think there is such a distinction. Different periods of limitation apply. The plaintiff's action for personal injuries is barred by the lapse of three years; that to the property not till the lapse of six years. The plaintiff cannot assign his right of action for injury to his person, and it would abate and be lost by his death before the recovery of a verdict, and, if the defendant were a natural person, also by his death before that time. On the other hand, the right of action for injury to property is assignable and would survive the death of either party. It may be seized by creditors on a bill in equity (*Hudson v. Plets*, 11 Paige 180), and would pass to an assignee in bankruptcy. Possibly the difficulties arising from the difference in the periods of limitation and the difference in the rule of survival between a personal injury and a property injury might be obviated in practice by holding the statute a bar to that portion of the damages, a claim for which would have been outlawed had it been a separate cause of action, and by permitting,

in case of death, the action to be revived so far as it relates to property. We do not see, however, how it would be practicable to deal with a case where the right of action for injury to the property had passed to an assignee in bankruptcy, or to a receiver on creditor's bill, without treating it as an independent cause of action. Though, as we have already said, section 484 of the code does not expressly determine the point in issue, still it is not without much force in the argument that the two injuries constitute separate causes of action. Under the old code of procedure, at the time of its original enactment injuries to person and injuries to property were separately classified as causes of action, and it was not permitted to join those of one class with those of another. Code Proc. § 167. By an amendment in 1852, injuries to persons and property were put in the same class. But by section 484 of the Code of Civil Procedure they are again placed in different classes, and cannot be united. If the plaintiff's cause of action is single, into what class does it fall? Is it for an injury to the person, which may be united with other causes of action for personal injuries, or is it for injury to property, which may be joined with claims of the same nature, or is it *sui generis*, a nondescript which must stand alone?

While some of the difficulties in the joinder of a claim for injury to the person and one for the injury to the property in one cause of action are created by our statutory enactments, the history of the common law shows that the distinction between torts to the person and torts to property has always obtained. Lord Justice Bowen, in the *Brunsdon* case, has pointed out that there is no authority in the books for the proposition that a recovery for trespass to the person is a bar to an action for trespass to goods, or vice versa. It is true that at common law the necessity of bringing two suits could, at the election of the plaintiff, be obviated in some cases, as, for instance, by declaring for trespass on the plaintiff's close, and alleging in aggravation thereof an assault upon his person. See *Wat. Tresp.* 205, 206. Still in such a case there would be but a single cause of action, to-wit, the trespass upon the close, and, if the defendant justified this trespass, it would be a complete defense to the action; the personal assault being merely a matter of aggravation. *Carpenter v. Barber*, 44 Vt. 441. Therefore, for reason of the great difference between the rules of law applicable to injuries of the

person and those relating to injuries to property, we conclude that an injury to person and one to property, though resulting from the same tortious act, constitute different causes of action.

The judgment appealed from should be reversed and a new trial granted; costs to abide the event.

COMMISSIONERS OF BARTON COUNTY v. PLUMB.

20 Kansas 147. [1878.]

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VALENTINE, J.: This was an action brought in Lyon County by the board of county commissioners of Barton county against P. B. Plumb and W. T. Soden on a certain penal bond executed by them. The petition below sets forth and alleges among other things the following facts: Said bond was executed by John McDonald as principal, and P. B. Plumb and W. T. Soden as sureties, and bound said McDonald, Plumb, and Soden unto said county of Barton in the penal sum of fifty thousand dollars, to be void however upon the condition that said McDonald should comply with all the terms of a certain written contract previously entered into between him and said board of county commissioners, whereby he agreed, for the consideration of \$24,200 to furnish all the material and build a certain court house within a certain time in said county of Barton. The petition also alleges that the county on its part complied with the terms and conditions of said bond and said contract, but that McDonald did not comply on his part with all the terms of said contract. In great detail it alleges that he did not complete said building within the time agreed upon by the parties, nor at any other time; that he did not furnish sufficient material therefor, and that, although he furnished some of the material therefor, and did some of the work thereon, yet that said material and said work were of an inferior quality, and were not such as were required by the terms of said written contract. The petition also alleges certain other facts tending to show the amount of the damages which resulted to the plaintiff from the non-compliance of McDonald with said contract, and then asks for a judgment for the plaintiff for \$12,000 damages, and costs of suit. The defendants moved "the court to require the plaintiff to separately state and number the several causes of action contained in plaintiff's petition"

—but they did not state or show how many or what causes of action they claimed were contained in the plaintiff's petition. The court sustained this motion; but the court was equally silent as to the number or kinds of causes of action it considered were contained in plaintiff's petition. The plaintiff failed to amend said petition in any manner whatever, and for that reason the court dismissed the action. The plaintiff assigns said rulings of the court below as error.

If the petition did in fact state more than one cause of action, as is claimed by the defendants, then the rulings of the court below were correct; but if it really stated only one cause of action, as is claimed by the plaintiff, then said rulings of the court below were evidently erroneous. We think the petition really stated only one cause of action. *Houston v. Delahay*, 14 Kan. 125, 130. (See also as throwing some light upon this question, the following cases, to-wit: *Hibbard v. McKindley*, 28 Ill. 240; *State v. Davis*, 35 Mo. 406; *Fisk v. Tank*, 12 Wis. 276, 298, 299; *Roehing v. Huebschman*, 35 Wis. 185, 187; *Smith v. B. C. & M. Rld.*, 36 N. H. 458, 484; *K. C. Hotel Co. v. Sigement*, 53 Mo. 176, 177.) The defendants by executing the penal bond set forth in the petition, agreed and guaranteed in substance, that McDonald should build said court house as he agreed to do; but McDonald failed. And this is what constitutes the plaintiff's cause of action, and we think it constitutes only one cause of action. It is true, that McDonald did not wholly fail. He built a court-house or a part of a court-house; but he did not build the kind and quality of court-house which the parties agreed should be built; and evidently, his partial failure to build said court-house, his failure in some of the innumerable particulars in building the same, would not constitute a greater number of causes of action than a total failure to build such court-house, a total failure in every particular. Even if this action should be governed by the same principles which would govern in an action brought by plaintiff against McDonald on his original contract to build said court-house, we would still think that the same result would follow, and that the facts of the case would constitute only one cause of action. McDonald simply agreed that on or before the 25th of December, 1873, he would furnish to the plaintiff, and at Great Bend, a certain kind and quality of court-house, completed and finished. He did not agree that he would furnish materials, *as materials*, or labor *as labor*. All

it is the failure to comply with contract which constitutes the cause of action; & the extent of the breach goes only to show the extent of the damages.

that he agreed to do with reference to furnishing materials or labor was that he would furnish them *in a court-house, and as a part of the court-house*. Under said contract it was his legal duty to furnish said materials and labor in said court-house, and not otherwise; and the plaintiff had a legal right to receive them in such court-house, and not in any other manner. That is, it was the legal duty of McDonald to furnish to the plaintiff said court-house as he agreed to do, and the plaintiff had a legal right to so require it. McDonald violated this right by not so furnishing said court-house. And this is just what constitutes the plaintiff's cause of action against McDonald on said contract. That is, the plaintiff's cause of action is founded on the right of the plaintiff to receive said court-house from McDonald according to said contract, and the violation of such right by McDonald. The failure on the part of McDonald to furnish materials or labor was no violation of any right of the plaintiff, except as he failed to furnish them in the building and as a part thereof. The materials and labor when furnished would not belong to the plaintiff until they were put into the building. Prior to that time they would belong to McDonald. He could bring materials onto the ground, and then take them away if he chose. He could put them into the building, or not, just as he chose. And after completing the building, (if he had done so) he could take away all the materials not used in the construction of the building. The plaintiff never did own nor could own under said contract any part of the materials furnished by McDonald, except as it owned them as parts and portions of said court-house building. From the foregoing, it will be seen that the plaintiff possessed one grand primary right, and only one such right, and that that right was to have a good court-house built according to said contract. Within this grand primary right, however, there existed innumerable subordinate and secondary rights. These subordinate and secondary rights reached to all the illimitable details in the construction of said building. Thus, the plaintiff had a right to have every brick of proper quality, and put into the building in a proper manner. So also with respect to every piece of lumber, pane of glass, nail, lock, hinge, etc. Now each of these innumerable subordinate rights might be violated, and the violation of any one of them would constitute a cause of action. Thus, if McDonald had put a broken or crooked pane of glass into a window, instead of putting in a

than one breach was duplicity. However, in Eng. penal bond were abolished by statute, & in U.S. by judicial legislation. Now in action on penal bond we give

good one, or had not puttied it in well, the plaintiff would have had a cause of action against him for the resulting damages. The same thing may be said with respect to putting a brick in the wall, or a piece of tin on the roof, or a board in the floor. And so on through all the limitless details in constructing the building. But the violation of each of these special and subordinate rights is also a violation of the more general and primary right, and altogether they constitute only one violation of this grand primary right. Now as the violation of any one of these subordinate rights would constitute a cause of action, it might seem that the violation of a hundred or a thousand of such subordinate rights would constitute a hundred or a thousand separate and distinct causes of action. But such is not the case, or at most it is rarely the case. Possibly the plaintiff might in some cases be allowed to elect whether he would treat the several violations of his several subordinate rights as separate and distinct causes of action, or as only one cause of action, but generally he would not be allowed to do so. Generally he would not be allowed to split up into several causes of action what he might prosecute as only one cause of action. In the present case we think that all the violations of the plaintiff's subordinate rights under said contract really constitute only one general violation of its general and primary right under said contract, and therefore that all of such violations really constitute only one cause of action. All of said violations taken together were merely a violation of the plaintiff's general right to have said courthouse built according to contract. McDonald was to be paid \$24,200 in installments, upon estimates made as work progressed; but it was expressly stipulated that "no payment or estimate shall be considered as acceptance of all or any part of the work; and no acceptance shall be conclusive and final until the entire completion and acceptance of the work." When McDonald abandoned the work, on 20th January, 1874, the plaintiff's cause of action was complete. The fact that the plaintiff afterward proceeded with the work, and completed the building, did not give to the plaintiff another or an additional cause of action. The necessary cost of completing the building may however be shown in the case for the purpose of measuring the plaintiff's damages.

There are several other facts alleged in the plaintiff's petition, which do not go to make up or constitute the plaintiff's cause

of action, but are alleged merely for the purpose of giving a measure for the plaintiff's damages, or special damages which have resulted from wrongs constituting the plaintiff's *cause* of action.

The judgment of the court below will be reversed, and the cause remanded with the order that said order of dismissal, and said order requiring the plaintiff to separately state and number the several causes of action contained in the plaintiff's petition, be set aside, and that further proceedings be had in the case in accordance with this opinion.

All the Justices concurring.*

BOYCE v. CHRISTY.

47 Mo. 70. [1870.]

BLISS, Judge, delivered the opinion of the court.

The plaintiff, formerly an apprentice of defendant, some six years after he had arrived at majority, brought suit upon the indenture. The statute only allows such suits to be brought within two years after the apprentice comes of age, and for that reason the petition was demurrable; for it is well settled that when the statute creates a bar by lapse of time, and the petition shows that the time has elapsed, the defense may be made by demurrer. (State v. Bird, 22 Mo. 470; McNair v. Lott, 25 Mo. 182; Van Hook v. Whitlock, 7 Paige, 373.) But the defendant failed to avail himself of the statute, either by demurrer or answer, and this being an action upon contract, its benefit was waived. (Benoist v. Darby, 12 Mo. 196; Sturgis v. Benton, 80 O. St. 215; Ang. Lim. § 285.)

The petition counts upon the indenture and charges various breaches in the form of independent counts, and the plaintiff obtained a general verdict of \$400, upon which judgment was rendered. Under our system such general verdict is erroneous, and judgment should have been arrested. Each count calls for

*Accord: Fisk v. Tank, 12 Wis. 307; Nichols v. Alexander, 28 Wis. 118 (several breaches of covenant); State v. Davis, 35 Mo. 406. (Several breaches of a penal bond); Rissler v. Ins. Co., 150 Mo. 366 (insurance policy where the total was apportioned to different articles).

Tendency is to apply the indivisible contract rule indiscriminately. In case of distinct covenants, to state

a separate judgment, and the rule under common law pleadings cannot apply to petitions under our statute. (Mooney v. Kennett, 19 Mo. 551; Clark's Admx. v. Hann. & St. J. R. R., 36 Mo. 202; Pitts v. Fugates, Adm'x, 41 Mo. 405; State v. Dulle, 45 Mo. 269.)

The plaintiff asks that the petition be treated as containing but one count, notwithstanding its form, inasmuch as the indenture was but a single contract. We might, perhaps, get over the form if there were really but one cause of action in the petition. But the breaches were separate and distinct; one charging a neglect in sending the apprentice to school; another in paying him money; others in other things. Their investigations involved separate and independent inquiries and findings on the part of the jury, and they should be held to be independent causes of action, although arising out of the same contract. The authorities upon this point are not altogether uniform, although there is a preponderance in favor of our view. The State v. Davis, 35 Mo. 406, was an action upon a sheriff's bonds, and the court held that the various breaches constituted but one cause of action. This point in the case was not noted in our only digest, and its decision failed to be considered by us when the question was subsequently raised. In Howard v. Clark, 43 Mo. 347, and in the State v. Dulle, 45 Mo. 271, the opposite view is held, and seems to us to be well founded.

The other judges concurring, the judgment is reversed and the cause is remanded.

for def.

HUESTON v. MISSISSIPPI & R. R. BOOM CO.

76 Minn. 251. [1899.]

MITCHELL, J.: In 1897 the plaintiff, as vendee under an executory contract of sale, was in the possession of a tract of land in Anoka county bordering on the Mississippi river, a tributary of which, called "Rice Creek," ran through the land. On this creek there was a mill for grinding flour and feed, operated by water power furnished by the creek. The mill had been operated by the plaintiff for some years, and had an established line of custom. About six acres of plaintiff's land near the river were used and were especially adapted for pasturage. The balance

On analysis, plain. had a new right of action every time a new overflow occurred; but it is convenient to treat it all as one cause of action, since

of the land was used in connection with the mill and the dam. About five-eighths of a mile below plaintiff's land there was an island in the Mississippi river, about half a mile long. Prior to 1897 the defendant built a boom from this island to the east bank of the river, and had established there its assorting gap for the purpose of distributing logs to the mills of Minneapolis. The defendant had also put in a line of piling from the upper end of the island to the west bank of the river, for the purpose of running logs into the boom. As a result of the erection and maintenance of these works, about the 1st of April, 1897, a large log jam was formed, which caused the water to overflow plaintiff's land, and come up into his mill, so as to injure it, and prevent him from operating it for some nine days. About the first of July, another jam occurred from the same cause, which again flooded plaintiff's land and mill, resulting in further damage to, and loss of the use of, the mill, and destroying and killing the grass on the pasture land to such an extent that it would require one or two years to restore it. Another consequence of this overflow was that when it receded it left sand and other debris on the pasture land. There is really no controversy but that the construction and maintenance of defendant's works caused these overflows, and consequent damage to plaintiff's premises. . . .

The complaint alleged generally the unlawful construction and maintenance of defendant's works, and the consequent injury to plaintiff's premises in 1897; and upon the trial he was permitted, against the objection of the defendant, to introduce evidence of the overflow and consequent damage, both in April and in July. There is nothing in the point that there were two separate and distinct causes of action, which ought to have been pleaded as such. It was in the nature of a continuing trespass by the same act, although resulting in actual damage on two different occasions.* . . .

Judgment affirmed.

*Accord: *Darby v. M., K. & T. Ry.*, 156 Mo. 391. *for plain.*

If the overflows had been caused by separate structures, plain. would have had to allege the separate trespasses in separate counts.

MILLARD v. M. K. & T. R. R. CO.

86 N. Y. 441. [1881.]

Appeal from judgment of the general term of the supreme court, in the second judicial department, entered upon an order made Feb. 10, 1880, which affirmed a judgment in favor of the plaintiff, entered upon a verdict. (Reported Below, 20 Hun. 191.)

This action was brought to recover for the loss of certain merchandise, while being transported on defendant's road.

The facts proved were substantially these :

On the 30th of April, 1873, the plaintiff and one William Brady purchased tickets and took passage on the defendant's road at St. Louis, Mo., for Dennison, Tex. Plaintiff had with him a valise, containing his wearing apparel and articles known as baggage, and a packing box or trunk, containing merchandise. Brady had with him one trunk, containing his personal baggage, and two packing boxes, or trunks, containing merchandise. The tickets entitled the plaintiff and Mr. Brady to carry a certain amount of baggage without extra compensation. The defendant's agent at St. Louis, on being advised of their contents, refused to put the packing boxes aboard the train, and insisted that they should be sent as freight. The plaintiff explained to him the nature of their contents, and that it was important that they should go on the train with them; and thereupon the agent weighed them together with the baggage, and charged \$8 or \$10 for carrying the packing boxes, which plaintiff and Mr. Brady paid, and they were then put aboard the train with the baggage; all were destroyed by fire on the following day, while in defendant's possession, and during the journey. Mr. Brady assigned his claims against the defendant to the plaintiff, and in 1873 the latter brought an action to recover the value of the baggage so lost; he recovered judgment in said action, which was paid. A bill of particulars was served in that action which contained the items of merchandise contained in the packing boxes as well as the baggage; the court, however, ruled upon the trial that nothing but the personal baggage could be recovered for in that action, as the complaint did not allege the contract to convey the merchandise, and that the goods now in suit did not come within the term "baggage," and accordingly excluded proof in

regard to the same; and plaintiff withdrew all claims for such merchandise.

EARL, J.: The claim is made on the part of the appellant, that the rule, that where a party brings an action for a part only of an entire, indivisible demand, and recovers judgment, he cannot subsequently maintain an action for another part of the same demand, was violated in the judgment rendered in this action.

The facts, as the trial judge found them, or may be presumed in support of the judgment to have found them, are as follows: There were two contracts made with each, the plaintiff and his assignor, one with each to carry him and his baggage, and the other subsequently made to carry the chattels contained in his trunk.

It was decided in the prior action that that was based solely upon the contract to carry the passengers and their baggage. The recovery was there limited to such baggage, and it ~~is~~ was held that the contracts alleged did not cover the chattels involved in this action.

This action is based upon separate contracts to carry the chattels which were not properly baggage, and which were contained in the trunks. It was manifestly in reference to such chattels that the extra compensation was demanded by the defendant and separate contracts thus made.

The former recovery does not, therefore, bar this action. A single demand was not divided in violation of the rule above referred to. (Stoneman v. Erie R. R. Co., 52 N. Y. 429; Sloman v. Great Western R. R. Co., 67 id. 208.) And this result follows although the plaintiff in the former action recovered for the trunks in which the chattels here in question were packed, because such recovery was had, perhaps erroneously, under the contracts there alleged, and not under the contracts alleged in this action.

The judgment should be affirmed, with costs.

for plain.

VAN HOOZIER v. HANNIBAL & ST. JOSEPH R. R. CO.

70 Mo., 145. [1879.]

HOUGH, J.: This is an action for damages arising from the diversion, by the defendant, in 1873, of a stream of running water, whereby portions of the plaintiff's land were, in the year 1875, overflowed and rendered unfit for cultivation, his crops

Darby v. M. & T., 156 Mo., is on all fours with Houston v. Miss. R. R. & Co.

destroyed and his timber injured. The defendant pleaded not guilty and a former recovery. There was a verdict and judgment for the plaintiff under the plea of former recovery. The defendant introduced in evidence the pleadings in a suit for damages, instituted by the plaintiff against it in 1875, together with the instructions of the court, the verdict of the jury and the judgment of the court thereon in favor of the plaintiff. It was then admitted by the parties "that the land injured is the same in both suits, that the parties plaintiff and defendant are the same, that the cause of the injury is the same, and the cause of the injury, defendant's railroad and plaintiff's land are all in the same condition as at the commencement of this suit, the judgment in which is pleaded in bar of this action, the only difference being that said former suit was prosecuted for damages during the years 1873 and 1874, while the present suit is for damages during the year 1875, and since the institution of the prior suit and to the institution of the present suit." By agreement of the parties, the plea of former recovery was first tried before the court, the defendant claiming that the cause of the injury, for which the former judgment was recovered was of a permanent character, and that the entire damages, both for past and future injuries, resulting therefrom, could and should have been recovered in that suit, and that the judgment therein was, therefore, a bar to the present action.

In cases of nuisance the rule is well settled that the plaintiff cannot recover for injuries not sustained when his action is commenced. It is equally well settled that when the injury inflicted is of a permanent character and goes to the entire value of the estate, the whole injury is suffered at once, and a recovery should be had, therefore, in a single suit, and no subsequent action can be maintained for the continuance of such injury. But when the wrong done does not involve the entire destruction of the estate, or its beneficial use, but may be apportioned from time to time, separate actions must be brought to recover the damages so sustained, and former suit will be no bar to a recovery in another action for damages suffered subsequent to the institution of the first suit. The town of Troy v. Chesire R. R. Co., 3 Foster 83; Cheshire Turnpike Co. v. Stevens, 13 N. H. 8; Wood on Nuis., § 856; Pnney v. Berry, 61 Mo., 367. The lands in question lie north of the defendant's railroad, and the stream diverted originally flowed along and a few rods south of said road. The de-

This case is like that of a sum payable in installments: creditor can bring an action after each installment falls due, for that installment; but if he

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defendant erected a dam or embankment across the channel of the stream and made a ditch or culvert in the road bed through which the water of the stream was conducted upon the plaintiff's land. Portions of these lands were annually cultivated after the nuisance was levied, and the crops thereon annually injured, so that it is patent that the injury thereby inflicted did not go to the entire value of the estate, but was of yearly recurrence and varied in extent with the volume of water discharged upon the land. Such being the facts, it is plain that the injury is a continuous one, susceptible of periodical apportionment, and, therefore, capable of being redressed by successive actions. It follows from these views that the court committed no error in overruling the plea of former recovery. * * *

* * * The other judges concurring the judgment of the circuit court will be affirmed.

for plain.

TAYLOE v. MERCHANTS' FIRE INSURANCE CO.

9 Howard, 390. [1850.]

NELSON, J., delivered the opinion of the court.

This is an appeal from a decree of the circuit court for the district of Maryland, which was rendered for the defendants.

The case in the court below was this: William H. Tayloe, of Richmond county, Virginia, applied to John Minor, the agent of defendants, residing at Fredericksburg in that state, for an insurance upon his dwelling house to the amount of \$8,000.00 for one year, and, as he was about leaving home for the state of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of the 25th of November, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at seventy cents on the thousand dollars, the premium amounting to the sum of fifty-six dollars. The agent stated in the application to the company the reason why it had not been signed by Tayloe; that he had gone to the state of Alabama on business, and would not return till February following; and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to Tayloe, under date of the 2d of December, advising him of the

terms of the insurance, and adding: "Should you desire to effect the insurance send me your check payable to my order for \$57, and the business is concluded." The additional dollar added was for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe until the 20th of the month; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the center building of the dwelling house in the meantime, on the 22d of the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view taken of the case by their agent, and refused to issue the policy, or pay the loss.

A bill was filed in the court below by the insured against the company, setting forth, substantially, the above facts, and praying that the defendant might be decreed to pay the loss, or for such other relief as the complaint^w might be entitled to.

1. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one is, that the contract of insurance was not complete at the time the loss happened, and therefore, that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defense.

1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and,

2. The non-payment of the premium.

(After deciding these contentions in favor of the complainant.)

3. It has also been objected, that the plaintiff had an adequate remedy at law, and was not, therefore, under the necessity of resorting to a court of equity; which may very well be admitted.

But it by no means follows from this, that a court of chancery will not entertain jurisdiction. Had the suit been instituted before the loss occurred, the appropriate, if not the only, remedy would have been in that court, to enforce a specific performance,

and compel the company to issue the policy. And this remedy is as appropriate after as before the loss, if not as essential, in order to facilitate the proceedings at law. No doubt, a count could have been framed upon the agreement to insure, so as to have maintained the action at law. But the proceedings would have been more complicated and embarrassing than upon the policy. The party, therefore, had a right to resort to a court of equity to compel the delivery of the policy, either before or after the happening of the loss; and being properly in that court after the loss happened, it is according to the established course of proceeding, in order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand.

Such relief was given in the case of *Motteux v. London Assurance Company* 1 Atk., 545), and in *Perkins v. Washington Insurance company* (4 Cow., 645). (See, also, 1 Duer., 66 and 110, and 2 Phillips, 583.)

As the only real question in the case is the one which a court of equity must necessarily have to decide, in the exercise of its peculiar jurisdiction in enforcing a specific execution of the agreement, it would be an idle technicality for that court to turn the party over to his remedy at law upon the policy. And, no doubt, it was a strong sense of this injustice that led the court at an early day to establish the rule, that, having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete justice between the parties, where it could as well be done in that court as in proceedings at law.

4. It is further objected, that, admitting the claim to be properly enforceable in equity, still, the complainant is not entitled to the relief sought, on the ground that the bill contains no sufficient statement of the contract, or of the performance of the conditions, and also for want of a proper prayer.

We are of the opinion that these several objections are not well founded. The contract as set forth we have already considered, and held complete and binding on the company; and further, that the denial of having entered into the agreement, and refusal to issue the policy, also set forth, are sufficient ground upon which to infer a waiver of the production of the preliminary proofs, as a condition of liability; and if sufficient ground to infer a waiver, it was of course unnecessary to set forth these proofs in the bill.

This rule of equity was 300 years older than the Code; but N. Y. courts treated it as new.

And as to the prayer, it is sufficient to say that the prayer for general relief which is here found, will enable the court to make such a decree as the complainant may show himself entitled to, upon the facts set forth in the stating part of the bill.

The pleading is not very formal, nor very cautiously drawn, and, in the absence of the prayer for general relief, might have led to embarrassment in making the proper decree in the case. There is a specific prayer for a decree for the loss, but it would have been more formal and appropriate, regarding the ground of jurisdiction in these cases, to have added also a prayer for a specific performance of the agreement to insure.

But the particular relief permitted under a general prayer, where the statement in the body of the bill is sufficient to entitle the party to it, meets the difficulty suggested, and well warrants the decree proposed to be entered. (Story, Eq. Pl., §§ 41, 42 and cases.)

Upon the whole, without pursuing the examination further, we are of opinion that the decree of the court below should be reversed, and that the cause be remitted, with directions to the court to take such further proceedings therein as may be necessary to carry into effect the opinion of this court.

Decree reversed with directions.

for plain

HUTCHINSON v. AINSWORTH.

73 Cal., 452. [1887.]

SEARLES, C. J. This cause was here on a former appeal, the decision of which is reported in 63 Cal., 286. In 1878, the defendants Anna Ainsworth and A. G. Ainsworth, made their promissory note to Margaret M. Hutchinson for \$3,500, payable on the third day of September, 1879, with interest at ten per cent. per annum. The note was given for money loaned to said defendant by plaintiff, who is a married woman, and was her separate property. To secure the payment of the promissory note, Anna Hutchinson executed the mortgage to foreclose which this action is brought. The property mortgaged was the separate property of Anna Ainsworth, who is a married woman. The acknowledgment made by said Anna Ainsworth is found to have been prop-

erly taken; but the notary, in certifying thereto, failed to specify that he made her acquainted with the contents of the instrument, separate from, and without the hearing of, her husband. A copy of the certificate is set out in the report of the case on the former appeal. In that appeal this court reversed the judgment and order of the court below, upon the ground of error in refusing plaintiff's application to amend her complaint so as to show that the acknowledgment was actually taken in compliance with the statute, with a view to a judgment correcting the certificate, as provided by section 1202 of the Civil Code.

This action was brought March 25, 1880. Upon the return of the cause to the court below, and on the 11th day of May, 1883, the complaint was amended, averring the acknowledgment to have been properly taken, and asking that the certificate be reformed and corrected. To this amended complaint the defendant demurred, upon the grounds, among others: (1) That there is a non-joinder of parties defendant, in that Will H. Burrill, the notary who took the acknowledgment, should have been made a defendant; (2) That two causes of action are joined in the same complaint without being separately stated; (3) That the cause of action is barred by the Code Civil Proc. subd. 4, § 338. The demurrer was overruled, and this action was assigned as error.

The demurrer was properly overruled. The notary was not a necessary party defendant to the reformation of his certificate. The reformation, if made at all, could only be so made by the judgment of the court. *Wedel v. Herman*, 59 Cal., 515.

The objection of the demurrer is not that two causes of action are improperly united, but that they are contained in the complaint, and are not separately stated. Waiving the question whether or not a proper uniting of two causes of action in the same complaint, without stating them separately, is a cause for demurrer, we are of the opinion the complaint states but one cause of action. "An action is an ordinary proceeding in a court of justice by which one party prosecutes another, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Code Civil Proc., § 22. The facts upon which the plaintiff's right to sue is based, and upon which the defendant's duty has arisen, coupled with the facts which constitute the latter's wrong, make up *the cause of action*. If these facts, taken together, give a unity of right, they constitute but one cause of action.

In equity the relief or the enforcement of a single right may be varied, and the facts essential to such relief may be set out without objection, as auxiliary to the right to be enforced. In the case at bar the object of the action is to collect a single debt, and to enforce a single lien, to redress a single wrong. To accomplish this object dual relief is sought, but this circumstance, so frequent in equity, does not constitute two causes of action. Pomeroy, at section 459 of his work on Remedies, in discussing this question, uses the following language: "Actions brought to reform instruments in writing, such as policies of insurance and other contracts, mortgages, deeds of conveyance, and the like, and to enforce the same as reformed by judgments for the recovery of the money due on the contracts, or for the foreclosure of the mortgages, or for the recovery of possession of the land conveyed by the deed, fall within the same general principle. One cause of action only is stated in such cases, however various may be the reliefs demanded and granted." *Meyer v. Van Collen*, 7 Abb. Pr., 222; *McClurg v. Phillips*, 49 Mo., 315.

The judgment and order appealed from are affirmed.

IMPERIAL SHALE BRICK CO. v. JEWETT.

169 N. Y., 113. [1901.]

LANDON, J. The plaintiff brought this action to reform a contract of insurance, and, as reformed, to recover against the 19 defendants as joint insurers of a cargo of pressed bricks shipped by plaintiff at Cleveland, Ohio, about October 2, 1895, to Waukegan, Ill. The cargo became a total loss, and did not reach its destination. * * *

The defendants complain that, against their objection and exception, the action was tried at the equity term, instead of before a jury. The plaintiff applied for insurance upon its cargo in transit by lake from Cleveland, Ohio, to Waukegan, Ill. By mistake, Waukegan, Mich., was written in the certificate, and not observed by the plaintiff until after the loss. There is no such port as Waukegan, Mich. The plaintiff properly asked in its complaint to have the certificate corrected in this respect. If the defendants had admitted by their answer the statement of facts alleged in this behalf in the complaint, as they did upon the trial,

the equitable issue would not have arisen; but they did not, but interposed a denial, and thus the case properly came on for trial at the equity term. The complaint does not contain separate equitable and legal causes of action, but it asks such relief in equity as would, if granted, permit a recovery as at common law. But the complaint stated no common law cause of action, except as conditioned upon the equitable relief, and hence the right to recovery rested primarily upon equitable grounds. The court, having obtained jurisdiction in equity may, if it grant the equitable relief, retain jurisdiction, and render that further judgment which properly follows thereupon. *Wheelock v. Lee*, 74 N. Y., 496, cited by defendants, was precisely the reverse. In that case, there were four causes of action at law for the recovery of money. Conditioned upon such recovery was the demand that certain securities be surrendered. Of course, in such a case, success in the actions at law is a condition precedent to any equitable relief, and the joinder of the former with the latter ought not to deprive the defendant of a jury trial of the former.

We have examined the other errors assigned by the defendants, but do not think any of them justify the reversal of the judgment of the trial term except as to the defendant Hickman.

The order of the Appellate Division should be reversed, with costs, and judgment of the trial court affirmed, except as to the defendant Hickman, and, as to him, order affirmed, and judgment absolute ordered in his favor on the stipulation, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, and CULLEN, J. J., concur.*

KABRICH v. STATE INSURANCE COMPANY.

48 Mo. App., 393. [1892.]

GILL, J. On November 5, 1888, the defendant by its policy insured for the period of one year one W. G. Nicum against loss or damage by fire on his farm house, in Audrain county, "loss if any, payable to George Kabrich, mortgagee, as his interest may appear." On Aug. 18, 1889, the building was destroyed by fire. Subsequently, the mortgagee Kabrich brought this suit. In his petition, and all in one count, in addition to the common allega-

*See also *German Ins. Co. v. Davis*, 6 Kan. App. 268.

tions common to actions at law on the contract of insurance, it was further alleged that certain conditions printed in the body of the policy and relating to the occupancy, transfer of the property, etc., were wrongfully, fraudulently, or by mistake inserted, and the court was asked to strike out such conditions, and reform the instrument. The defendant moved and the court required the plaintiff to elect upon which of the two causes of action, thus set out in one count, he would proceed to trial. The plaintiff elected to try the action at law on the policy, and thereupon the court struck out the matter relating to the reformation of the contract.

Among other matters of defense, the answer set out that by the terms of the policy if the title of the property was, after the issuing thereof, transferred or changed without the written consent of the company indorsed on the policy, then said policy should be void. The evidence showed unquestionably that about two months after the policy was issued the assured Nicum did sell and convey the property to one Kelley, and to this the defendant company had not consented, nor, indeed, had any notice. At the close of the evidence the court instructed the jury as follows: "The court instructs the jury that the deed read in evidence, from W. G. Nicum to Julia Kelley, conveyed the property insured after the issue of the policy, and before the fire, and that fact, under the terms of the policy, rendered it void, as the company failed to consent thereto in writing, and the jury will, therefore, render a verdict for defendant."

From a verdict and judgment for defendant the plaintiff appealed.

1. The court correctly required plaintiff to elect upon which of the two causes of action, stated in one count of the petition, he would proceed to trial. Clearly plaintiff had intermingled in the one count two causes of action; one to reform the policy, which was equitable, and triable alone before the court, and the other an action at law on the policy, which was triable by a jury. While the code permits the joining of legal and equitable suits, yet they must be separately stated and relief separately prayed, so that each may be separately tried, the one by the court, and the other, if desired, by the jury. *Henderson v. Dickey*, 50 Mo., 161. He might with propriety have amended his petition and separated the two causes into two distinct counts, and then tried each separately. But he failed to amend, and chose to submit his case on the one count,—the legal action on the policy; thereby in effect

Sometimes right to legal relief does not necessarily follow from the equitable relief granted; in which case plaintiff must sue at law.

abandoning the cause in equity. Electing to prosecute one of the two causes of action (which have been erroneously combined in one count) is necessarily the abandonment of the other. The plaintiff then having relinquished the suit to reform the policy, he was not entitled to introduce evidence only pertinent thereto; and, hence, the court did not err in excluding such proffered evidence. And this answers counsel's point number 2. * * *

*Judgment affirmed.**

LATTIN v. McCARTY.

41 N. Y., 107. [1869.]

Appeal by the plaintiff from a judgment of the General Term of the Supreme Court in the fifth district, affirming a judgment of the Special Term, sustaining a demurrer to the complaint. The demurrer was at first stricken out as frivolous at Special Term in the seventh district; but on appeal to the General Term, this was reversed (17 How., 140), and the demurrer then argued at the Special Term in the fifth district with the result already stated.

A deed of certain premises in the city of Auburn, was executed by E. Corning, to the defendant, Michael McCarty, at the request of Stanford, who had purchased the premises of McCarty, and for the sole purpose of completing his (Stanford's) claim of title.

This deed was delivered to Stanford (and never to McCarty), with that intent, and Stanford deposited for record in the clerk's office.

At this time Stanford had mortgaged to Fitch & Griswold, who had foreclosed and conveyed to Lattin, the plaintiff, who had repaired the premises and put in a tenant.

McCarty somehow heard that there was a deed from Corning to him, recorded in the office; and he went to the tenant and bribed him to leave, took possession himself, now holds adversely to plaintiff, and claims to own the premises by virtue of that deed.

*Accord: Harrison v. Juneau Bank, 17 Wis. 340; Guernsey v. Am. Ins. Co., 17 Minn. 104.

See also McHoney v. German Ins. Co., 44 Mo. App. 426.

McCarty's former interest in the premises, was under a *contract* from Corning to him; and in selling out to Stanford he had only assigned the contract, and Stanford, thinking McCartney had *deeded* to him, originated the mistake in getting a deed and recording the deed from Corning to McCartney. These facts were set up in detail in the complaint.

The relief asked for by plaintiff is:

1st. Possession.

2d. A conveyance of McCartney's apparent title, by quit claim or otherwise, etc., and that he be forever barred from setting up or asserting his pretended title.

McCarty's demurrer is on the ground:

1st. That the complaint does not set out facts sufficient to constitute a cause of action.

2d. That there is a defect of parties defendants.

3d. That several separate and distinct causes of actions have been improperly united.

HUNT, Ch. J. The demurrer of the defendant, McCartney, was sustained, on the ground that inconsistent causes of action were included in the complaint. This decision was erroneous.

1. The complaint contains but a single cause of action, to wit:—For relief against the deed under which McCartney fraudulently obtained possession. It is quite true that while the purpose of the complaint is single, it seeks to accomplish that result by several operations. It seeks to have the fraudulent deed set aside, and when that is done, it will follow that the plaintiff shall be awarded the possession of the property. The first is a means simply of obtaining the second. The one is the cause of action; the other is the fruit of the action. It is said that the two causes of action are:—First, to vacate the fraudulent deed, and second, an action of ejectment to obtain the possession of the premises. Not so. The plaintiff has no legal title to the premises, and admits that he cannot sustain an action of ejectment for that reason. His cause of action is simply to vacate the deed. If that is done, he insists, as a result, that the court will at once award him the possession of the property. It would be unreasonable, he argues, to compel him to resort to another action to obtain that to which he is clearly entitled, and which the court may award in the action before it. I think the reasoning sound.*

2. Assuming that the complaint does contain the two causes

*Accord: Duvall v. Tinsley, 54 Mo. 90.

of action, as is insisted, the judgment was still erroneous. The argument principally relied upon to sustain the demurrer, is this, that the two causes of action are of different characters; one, an action of ejectment, being an action at law, the other an action to set aside a deed as fraudulent, and of an equitable nature; that the latter may be tried by the court, while in the former, the party is entitled to have his case passed upon by a jury. The codifiers labored assiduously to anticipate and to overrule this objection. They recited in the preface to the code, that "it is expedient that the present forms of actions and pleadings, in cases at common law, should be abolished; that the distinction between legal and equitable proceedings, should no longer continue; and that an uniform course of proceeding in all cases should be established." In section 69 (original section 62) it is further enacted that "the distinction between actions at law and suits in equity, and the form of all such actions and suits heretofore existing, are abolished: and there shall be in this state, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." And in section 167, it is provided, "that the plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both," under the conditions therein specified. In these provisions and in others, the distinction between legal and equitable causes of action, is recognized. There is no attempt to abolish this distinction; which would be quite unavailing. The attempt is to abolish the distinction between the forms of action and the modes of proceeding in the several cases. The difficulty under consideration has also been expressly overruled in this court, in the cases that I shall presently cite.

The case of *Phillips v. Gorham* (17 N. Y. R, 270), is an authority in favor of the plaintiff. It was there held that in an action to recover specific real property, the plaintiff may attack a deed under which the defendant claims title, as well upon grounds cognizable at law as upon those cognizable in a court of chancery, and that such proceedings can be had and heard in a single suit. This conclusion was reached after an able and learned opinion by Johnson, chief judge, in which both the provisions of the constitution and the code are fully considered.

In *Lamb v. Buckmiller* (17 N. Y. R., 626), Roosevelt, J., in delivering the opinion of the court, says: "I shall assume, as has

been several times decided, that legal and equitable relief may be asked for in one action, and that the plaintiff claiming under a defective deed, and showing sufficient grounds for its reform, may have the same remedy as if he had brought two actions, one to reform the instrument, the other to enforce it as reformed."

Bidwell v. The Astor Mutual Insurance Co. (16 N. Y. R., 263), was an action to reform a policy of insurance, and to recover damages for the breach of contract so reformed in the same action. On the proposition that an action should be brought to reform the policy, and that a separate action should be brought to recover the damages, the court says: "There was nothing in the objection that the court should have stopped with reforming the policy, and turned the plaintiff over to a new action to recover their damages. The rule of courts of equity was, when they had acquired jurisdiction and had the whole merits before them, to proceed and do complete justice between the parties." (Page 267.)

The New York Ice Co. v. The Northwestern Insurance Co. (23 N. Y. R., 357), was also an action to reform a policy of insurance and to recover damages. In giving what appears to be the unanimous opinion of the court, Comstock, J., uses this language: "It was erroneous to turn the plaintiff out of court on the mere ground that he had not entitled himself to the equitable relief demanded, if there was enough left of his case to recover the sum in which he was insured." In discussing *Reubens v. Joel* (3 Kern., 488), he adds: "The doctrine of the previous cases favorable to uniting in the same action legal and equitable grounds for relief, was not intended to be disturbed, and a case in this court of a later date has reaffirmed that doctrine in the most explicit manner. (*Phillips v. Gorham*, 17 N. Y. R., 270). In this case the point was most strongly presented, and it was decided upon the fullest consideration. I think it proper to mention that the reason why I expressed no opinion in the case was, that I hesitated in regard to the power of the legislature, under the constitution, to abrogate all distinctions between legal and equitable actions. That such was the expressed intention of the legislature in the code of procedure, I never had any doubt. Both of these questions must now be considered at rest." (Page 360.)

I can find no countenance for this demurrer in the allegation that the causes of action, assuming that there are two, are improperly united in the same complaint. (Section 144.) The joinder

of several causes of action is expressly authorized, whether legal or equitable in their character, or both, where they both arise out of the same transaction, or transactions connected with the same subject of action. (Section 167.) Such is the present case. The transaction is one out of which both causes of action arise. By the agreement between the plaintiff and McCarty, the former was entitled to the deed from Mr. Corning of the premises in question. By the error of the plaintiff and the fraud of McCarty, the latter obtained this deed himself. The plaintiff now seeks to have the title transferred to himself through a correction of these wrongs. Both claims are harmonious and consistent with each other. They arise out of the same transaction, or certainly out of transactions connected with the same subject of action.

Judgment of the general term and special term should be reversed.

WHETSTONE v. BELOIT STRAW BOARD COMPANY.

76 Wis., 613. [1890.]

ORTON, J. The plaintiff alleged in his complaint that he was employed in and about the shop or building in which the defendant manufactured straw building board by the use of dangerous steam machinery, and by the use of steam rotaries made of boiler iron, which were in an unsafe and dangerous condition, to the knowledge of the defendant, or which it might have known by reasonable care, and which was unknown to the plaintiff, and that, by reason of their unsafe and dangerous condition, one of them burst or exploded, and scattered the fragments thereof about said building, some of which struck the plaintiff, and injured him very greatly, and caused him to be in such a condition of mind that he did not know what he was doing, and could not, and did not, realize his situation, or appreciate the effect of, or carry on, any business transaction. And the plaintiff, alleged further, that while he was in such condition of body and mind, the defendant, through its officers and agents procured and induced him to sign a certain receipt, set out in the complaint, by which he released the defendant forever from all liability by reason of any and all injuries sustained by him as aforesaid, or any result therefrom, and from all actions, or causes of action, against the defend-

ant by reason thereof; that, at the time of signing said instrument, he (the plaintiff) was not in a condition to realize what he was doing, or the effect thereof; and that the defendant took advantage of his condition, and procured the said instrument by fraud. The plaintiff prayed judgment for \$20,000 damages, and that said receipt or release be declared void and delivered up. This is, substantially, the complaint. The defendant demurred to the complaint, (1) that in it several causes of action were improperly united; and (2) that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. The first ground was the only one pressed on the argument. The learned counsel of the appellant contended that the matter of the release constituted a separate and distinct cause of action that could not be joined with the main action.

It is quite obvious that the complaint states only one cause of action. The matter of the release is simply ancillary to the action. It is merely to set aside the release, which stood in the way of recovery in the action. It is subservient or subsidiary to the action, and is necessary to a recovery. The plaintiff might have waited for the defendant to set up the release in defense, and then have attacked it by a replication; but he chose to set it up in his complaint and avoid it, which is strictly correct pleading. *Lusted v. Railway Co.*, 71 Wis., 391, 36 N. W. Rep., 837. In that case the receipt was set up in the answer, and the issue thereon was first tried. In *Damon v. Damon*, 28 Wis., 510, the plaintiff first set up her causes for a divorce, and secondly asked for alimony, and thirdly prayed that a certain deed made by the defendant to a third person in fraud of her rights be set aside, and such third person was made a party. The defendant demurred for misjoinder of causes of action, as here. This court held that there was but one cause of action, and that the matter of setting aside the deed was to enable the court to enforce its judgment of alimony, if it adjudges a transfer of property to the plaintiff, and that it is only ancillary or incident to the action. That is a stronger case of two separate causes of action than here. In *Moon v. McKnight*, 54 Wis., 551, 11 N. W. Rep., 800, the action was against A and B, who are husband and wife, and H, who held a mortgage of land from B, to have a prior deed from A and B to plaintiff, absolute on its face, declared a mortgage; to have a subsequent recorded deed, purporting to have been executed by the plaintiff to B, conveying to her the same land, set aside as a

forgery; and to have the plaintiff's mortgage foreclosed against all the defendants. This complaint was also demurred to for improper joinder of separate causes of action. This court held that there was virtually but one cause of action. These apparently separate causes of action, and the relief therein, "were essential and a prerequisite to the plaintiff's foreclosure." They were obstructions to the main relief, and had to be removed to make the plaintiff's judgment of foreclosure effectual. Many other like cases might be cited, if it was not too plain a question for argument or authority. The order of the circuit court is affirmed, and the case remanded for further proceedings according to law.*

LYON, J., took no part.

(c) *Causes That May Be United.*

X PLANKINTON v. HILDEBRAND.

89 Wis., 209. [1895.]

Action to enforce pledge of stock given to secure a promissory note and to obtain personal judgment against the maker and indorser of the note.

PINNEY, J. * * * . The complaint contains allegations of the liability of the defendants, Andrew Hildebrand, as maker, and of Frank A. Lappen and Owen Lappen, Jr., as indorsers, of the note in question, and shows that the Lappens had been charged as indorsers thereof; and personal judgment is demanded against these three defendants for any deficiency that may remain unpaid after proper application of the proceeds of the stock. Such a judgment would be for a purely legal demand. It is no part of the ordinary functions of a court of equity to entertain suits for, or to enforce, purely legal demands, such as are founded on promissory notes, indorsements, guaranties and the like. We have not been referred to any authority showing that such a judgment or decree could be given by a court of equity. In the absence of some statute extending their power, courts of equity, in foreclosure cases, have invariably left the complainant to his remedy at law for the part of the mortgage debt not satisfied by

*Compare *Hancock v. Blackwell*, 139 Mo. 440.

the foreclosure and sale. Statutory provisions of the character referred to were adopted in Wisconsin during its territorial existence, and continued in force until, by the adoption of the code, they were repealed. The result was that it was held by this court, in several cases, after the repeal of the statute, that the legal cause of action on the note or bond could not be joined with the equitable one to foreclose the mortgage, unless both causes of action affected all parties to the action; the statute then in force on the subject of joinder of causes of action being identical with Rev. Sts., § 2647. In *Sauere v. Steinbauer*, 14 Wis., 70, 75, it was held that such a joinder could be made where there was but a single defendant, who was personally liable for the mortgage debt; and the cases of *Turner v. Pierce*, 34 Wis., 658, and *Pinkum v. City of Eau Claire*, 81 Wis., 301, 51 N. W., 550, much relied on by the appellant, are cases, also, where there was but a single defendant. The rule thus laid down as to joinder of causes of action was firmly and invariably upheld until the statute was restored by Chapter 243, Laws 1862 (Rev. Sts., § 3156); *Borden v. Gilbert*, 13 Wis., 670; *Sauer v. Steinbauer*, 14 Wis., 70, 75; *Cary v. Wheeler*, Id., 281; *Jesup v. Bank*, Id., 331; *Stillwell v. Kellog*, Id., 461; *Faesi v. Goetz*, 15 Wis., 231. We have not been referred to, nor are we aware of, any case in this court, on this point, to the contrary. All these cases proceed upon the ground that, though stated in one count, there are, in such cases, two causes of action,—one equitable, and the other legal. The mere form of pleading can make no difference. The objection to the character of the complaint and the joinder of causes of action cannot be thus obviated. *Wiles v. Suydam*, 64 N. Y., 173. And the objection of misjoinder of causes of action may be taken by a defendant affected by both causes of action, or by only one of them. *Hoffman v. Wheelock*, 62 Wis., 435, 22 N. W., 713, 716; *Nichols v. Drew*, 94 N. Y., 22. The court must look to the intrinsic nature of the claims embodied in the complaint, and the character of the relief demanded. *Faesi v. Goetz*, supra. It seems that in the code of New York on the subject of “Joinder of Causes of Action,” similar to the provision of our statute, it was found necessary to make exceptions as to mortgage foreclosures, and in respect to which, as in Wisconsin, special provisions were found necessary. *Nichols v. Drew*, 94 N. Y., 26. We see no reason for departing from what has been so frequently—and, as we think, rightly—decided upon this point, and that it must be

left to the legislature, in its wisdom, in the spirit of much needed legal reform, to adapt Section 3156, to legal foreclosures of pledges, mortgages of personal estate, and other liens. The statute on the subject of "Joinder of Causes of Action" (section 2647), provides for "uniting in the same complaint several causes of action whether they be such as were formerly denominated legal or equitable, or both, where they arise out of the same transactions connected with the same subject of action. * * * But the causes of action so united * * * must affect all the parties to the action." Although the stock pledged was issued to Fred Hildebrand originally, there is no claim that he ever became in any way personally liable for the debt evidenced by the note; and the causes of action based upon the note and indorsement of it, for judgment for deficiency, do not affect him in the least. Many cases were referred to in this court as sustaining, in principle, the joinder of causes of action in this case; but we think that they are readily distinguishable from the present case, and, in the main, depended upon the principles laid down in the books on the subject of multifariousness in bills in equity, where there was really but one cause of action, and it was sought to charge one or more of the defendants, who had acquired and held a portion only of the property or fund, the subject of the action, acquired by fraud or affected by some trust. But under the equity practice, as it existed before the code, and in the absence of a statute justifying it, a bill framed as this complaint is would have been clearly multifarious, and we have not been referred to any authority sustaining a different conclusion. A review of the cases cited in this connection would not, we think, serve any useful purpose. For the reasons stated, there is, therefore, in the present case, a fatal misjoinder of causes of action, and for this reason the demurrers to the complaint were rightly sustained. The orders of the circuit court are affirmed.

CLARK v. GREAT NORTHERN RAILROAD CO.

31 Wash., 658. [1903.]

The complaint in this case, to which the conductor, as well as the company, was made a party defendant, contained two counts; the first sought a recovery for a breach of the contract, to carry; and the second sought damages for the wrongful expulsion of the plaintiff from the train.

MOUNT, J. * * * We think this demurrer should have been sustained upon the second ground stated. It is readily seen that the first cause of action is based upon a violation of contract of carriage; that the second cause is based upon the alleged tort of the company and its agent Willerton in removing the respondent from the train, using excessive force and violence therein. The statute regulating the joinder of causes of action in this state (section 4942, 2 Ballinger's Ann. Codes & St.), is as follows:—"The plaintiff may unite several causes of action in the same complaint, when they arise out of,—(1) contract, express or implied; or (2) injuries, with or without force, to the person. * * * But the causes of action so united must affect all the parties to the action and not require different places of trial, and must be separately stated." This statute does not authorize the joinder of causes *ex contractu* with causes *ex delicto* in the same complaint. *Magee v. O. R. & N. Co.* (C. C.), 46 Fed., 735. It merely authorizes the joinder of causes of like character; that is, any number of causes upon contract may be united in one complaint when the parties and the places of trial are the same. So also any number of causes of action for injuries with or without force, where the parties and place of trial are the same, may be united in one complaint. But actions on contract cannot be united with actions on tort. *Thompson's Commentaries on the Law of Negligence*, § 3263; 15 Ed. Pl. & Pr., p. 1124; *Fetter on Carriers*, §§ 422, 425; *Boylard v. Hot Springs R. R. Co.*, 132 U. S., 148, 10 Sup. Ct., 50, 33 L. Ed., 290.

Again, the appellant Willerton was not a proper party to the first cause of action. If the respondent had a contract of carriage with the railway company, and Willerton, acting as agent for the appellant, had violated the agreement by refusing to comply with the terms of the contract, the appellant railroad company was alone responsible for the damage caused thereby. The

agent, not being a party to the contract, was not liable for the performance or non-performance of it. For this reason also the causes were improperly united. The demurrer should, therefore, have been sustained. * * *

For these reasons the cause is reversed, and remanded for further proceedings in accordance with this opinion.

McCLURE v. WILSON.

43 N. Y. S. (App. Div.), 209. [1897.]

RUMSEY, J. The complaint contains three causes of action. The first alleges that the Life Union was a domestic corporation, of which, on the 29th of November, 1893, the plaintiff was appointed receiver, and that he qualified. The complaint further alleges that from the 16th of June, 1891, to the 20th of May, 1892, the defendant was one of the directors of the corporation, and that, as such, he and a majority of the other directors agreed, in consideration of the payment to them by one Louis P. Levy of the sum of \$15,000, that a certain number of the directors of the corporation would resign as such, and allow Levy and such persons as he might designate to be elected directors, and that the defendant and his associates would turn over the assets and control of the corporation to Levy and the persons designated by him as directors. The complaint then goes on to allege that this transaction was carried out; that the directors resigned pursuant to the agreement, and Levy was elected president, and his associates were elected directors, and the management of the corporation was transferred to them; and that the defendant and his associates received from Levy the sum of \$15,000, of which \$2,000 was paid to the defendant, and applied by him to his own use. The complaint then alleges that, at the time of receiving this sum of \$2,000, the defendant knew that the money so paid to him was a part of the said sum of \$15,000, and that the same was the property of and belonged to the said Life Union, and that the Life Union was not indebted to the defendant, and not under any obligation to pay him any sum whatever. The first cause of action concludes with the allegation that the defendant received said sum of money for the use and benefit of the Life Union, and therefore should account to

the plaintiff for the said sum of \$2,000. The second cause of action contains substantially the same allegations as the first, except that it does not allege that the defendant received to his personal use any part of the \$15,000, and the subsequent allegations in that count. It contains, however, an allegation that the agreement between Levy and his associates and the defendant and his associates was fraudulent and void, and in violation of the duties which, as directors, they owed to the said corporation; that, in consideration of the unlawful transfer to said Levy, this defendant and his associates received the sum of \$15,000, which they wrongfully and unlawfully applied to their own use. The second cause of action then continues, that the said sum of \$15,000 was the property of the Life Union and its creditors, and its unlawful appropriation by the defendant has damaged the said Life Union in the sum of \$15,000. For the third cause of action the complaint sets out the transaction substantially as set out in the second cause of action, and goes on with allegations to the effect that, by reason of the mismanagement and misconduct by Levy, the corporation became insolvent, and the fund held by it for the payment of death claims were wasted, and that the death claims, amounting to \$77,861, became due, and have not been paid, and alleges that the said Life Union and its creditors sustained damage to the amount of \$77,861.

The demurrer is upon that ground that causes of action upon contract are joined with causes of action for tort. The demurrer was overruled at special term. It was claimed by the plaintiff that the order was correct, for the reason that the demurrer was not good in form, because it does not state that there is a misjoinder of causes of action. But it is not necessary, in all cases, that the demurrer should be taken in the precise words of the code. It is only required that the ground of demurrer should be so plainly stated that it may be clearly understood. This, we think, the demurrer does. It should specify the causes of action which are improperly united, where such misjoinder is the ground of the demurrer. It is sufficient simply to state, as is done here, that one cause of action, naming it, is united with another cause of action, naming it, which the code does not permit to be joined; and it is not even necessary to negative that part of section 484 which prescribes that certain causes of action arising out of the same transaction may be joined. The question, then, is properly raised, and it remains to be seen whether the objection is well taken.

The first cause of action is brought, clearly, to recover money received by the defendant, but which belonged to the Life Union. It is apparent from the allegations that the money sought to be recovered was a portion of the money paid by Levy to the defendant and his associates for the consideration of the transfer of the control of the corporation. It is not alleged, nor is it to be inferred from the allegations in the complaint that the money was paid out of the treasury of the corporation, because the allegation is that the money was to be paid by Levy as a consideration for getting control of the corporation. It is true that the statement of the cause of action contains an allegation that the money was the property of the Life Union, but that is plainly a statement of the legal conclusion which the pleader supposed to arise from the allegations of the facts under which the money was paid and the purposes for which it was received. The first cause of action proceeds upon the theory that there was a bargain between Levy and the defendant, with others, which was carried into effect by the payment of money, and that that money belonged, when paid, to the corporation; and the plaintiff, as receiver, seeks to recover it back. It is a cause of action for money had and received. The theory of it is that the bargain, if not a valid one, is affirmed by the receiver, and he seeks to recover that which was paid to the defendant as a consideration for the transfer of the control of the corporation, and which, he insists, should have been paid by the defendant to the corporation. The cause of action stands upon the contract which the law implies on the part of one who has received money which he should pay over to another, to make such payment. It is a cause of action upon contract, and nothing else. *Trust Co. v. Gleason*, 77 N. Y., 400, 403. The same thing is true of the second cause of action. It is just as clear that the third cause of action proceeds upon an entirely different theory. It sets up that the agreement was fraudulent and void, and made in violation of the duties which the directors owed to the corporation, and does not seek to recover anything upon the basis of the existence of the contract. The foundation of this cause of action is that the transaction was fraudulent and void, and in violation of the defendant's duty, and that, as the result of it, the corporation was so badly managed that it was deprived of a considerable amount of its assets. The relief demanded is that the plaintiff may recover the amount of the assets of which the corporation was deprived, as the result

of this illegal act. This cause of action is plainly for a tort. So it here appears that the first and second causes of action upon a contract are joined with a third cause of action for a tort. This cannot be done. *Keep v. Kaufman*, 56 N. Y. 332.

But it is said that these three causes of action arise out of the same transaction, and for that reason they may be joined, under subdivision 9 of section 484 of the Code of Civil Procedure. It is not necessary to consider whether this claim is well founded or not. By the subsequent portions of the sections just cited, no causes of action can be united unless they belong to one of the foregoing subdivisions, and are consistent with each other. These two causes of action are entirely inconsistent. The first and second are based upon the theory that the contract is valid between the parties, and has been adopted by the corporation, and, because of that, the money belongs to the corporation, and should have been paid over to it. The third proceeds upon the theory that the contract is invalid and illegal, and no rights were acquired under it, and repudiates it, and seeks to recover damages for what was done by virtue of it. For these reasons, the misjoinder is not saved by the ninth provision of section 484 of the Code, and the demurrer is well taken.

The judgment overruling the demurrer must be reversed, with costs, and judgment ordered for the defendant upon the demurrer, with costs, with leave to the plaintiff to amend the complaint within 20 days, upon the payment of the costs of the demurrer and of this appeal. All concur.*

GREAT WESTERN COAL CO. v. CHICAGO G. W. RY. CO.

98 Fed. (C. C. A.), 274. [1899.]

THAYER, Circuit Judge. The general question which arises upon this record is whether the trial court committed an error in compelling the Great Western Coal Co., the plaintiff below and the plaintiff in error here, to elect, in advance of the trial, upon which one of two causes of action stated in its petition it would proceed to trial. The motion to compel an election, which was made in behalf of the Chicago Great Western Railway Com-

*Accord: *Enterprise Soap Works v. Sayers*, 51 Mo. App. 310.

pany, the defendant below and the defendant in error here, was sustained, notwithstanding an objection which was duly interposed by the plaintiff company. Having been compelled by a peremptory order of the trial court to choose as between the two counts contained in its petition, it elected to stand on the second count, whereupon the court ordered and adjudged that the first count be dismissed at the costs of the plaintiff. A trial was afterwards had on the second count, which resulted in a verdict and judgment in favor of the defendant company.

The first count of the petition was an ordinary declaration upon a contract, for a breach thereof; and the second count was likewise a declaration upon a contract, and claimed damages for a breach of the same. It will suffice to say, generally, concerning the two counts of the petition, without reciting either of them at length, that in the first count the plaintiff company alleged, in substance, that it had theretofore made a contract with the defendant company to supply to the latter a large quantity of coal at certain of its coaling stations along the line of its road at an agreed price of \$1.45 per ton; that it had proceeded with the execution of said contract up to a certain point, and had delivered a certain quantity of coal, when one of its coal veins gave out, or proved defective; that it thereupon entered into an agreement with another coal company, to-wit, the Maple Grove Coal & Mining Co., to obtain from the latter at its mines the amount of coal which was necessary to enable it to complete its contract with the defendant company, and that it advised the defendant company of such fact, and of the terms of the arrangement; that the defendant, when so advised of the arrangement between the plaintiff and the said Maple Grove Coal & Mining Co., assented to the arrangement which had been so made, and agreed to take the remainder of the coal which was due under its contract with the plaintiff from the mines of the said other coal company, pursuant to the terms of the agreement between the plaintiff and said other company; but that the defendant company subsequently refused to take any coal from the mines of said Maple Grove Coal & Mining company in fulfillment of the contract with the plaintiff, as it had agreed to do, although the plaintiff was at all times ready and willing to supply coal in the quantities needed, and strictly in accordance with the modified agreement. For the breach of the aforesaid agreement, damages were demanded by the plaintiff in the sum of \$65,000.

The second count of the plaintiff's petition was the same as the first up to the *ad damnum* clause and prayer for judgment. It was then averred, in substance, that inasmuch as the plaintiff claimed damages from the defendant in the sum of \$50,000 because of the breach of the contract described in the preceding paragraphs of the count, the two parties—that is to say, the plaintiff and defendant—had thereupon entered into another agreement for the purpose of compromising and settling the differences that had arisen under the first contract, by which compromise agreement it was made obligatory upon the defendant to pay to the plaintiff the sum of \$24,000 in installments as soon as the plaintiff had made a settlement with said Maple Grove Coal & Mining Company which would be effective to release the defendant company from all obligations on its part to take more coal from said Maple Grove Coal & Mining Company. The plaintiff next averred that with great expense and difficulty it had caused such a settlement to be made with the Maple Grove Coal & Mining Company, but that the defendant, in violation of the second or compromise agreement, had wholly failed to keep and perform the same, to the damage of the plaintiff company in the sum of \$24,000, for which latter amount it demanded a judgment.

In support of the judgment below it is argued that the two counts of the petition are inconsistent, and that for that reason the motion to require an election was properly sustained. We think, however, that this view of the case is erroneous, since the facts alleged in the first count are obviously consistent with those alleged in the second, in that proof of the facts averred in either count would in no wise disprove the facts stated in the other. The first contract may have been made and broken to the plaintiff's damage in the sum of \$65,000, and thereupon the parties may have entered into the second or compromise agreement, which was likewise broken to the damage of the plaintiff in the sum of \$24,000. Clearly, therefore, there is no inconsistency in matters of fact, and it is such an inconsistency—that is to say, where the proof of one state of facts alleged disproves the other—which vitiates a pleading under the Code of Procedure of the State of Missouri, from whence this case comes. *Nelson v. Brodhack*, 44 Mo. 596; *Roberts v. Railway Co.*, 43 Mo. App. 287, 289. It is true, no doubt, and that point may be conceded, that the plaintiff below was not entitled to a judgment under

both counts of his petition. If he succeeded in recovering a verdict on the first count, there was no basis for a recovery on the second count; and if he was successful in establishing the compromise agreement alleged in the second count, then it followed that, as the parties had liquidated the damages occasioned by the breach of the first contract by mutual agreement, the recovery by the plaintiff of such liquidated damages would necessarily prevent a recovery on the first count. Do these considerations lead to the conclusion that the trial court could properly compel an election before any testimony was introduced? We think not. Under the Missouri Code of Procedure, it is the established doctrine that the provision of the Code of that state which requires the plaintiff to set forth in his petition "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition" does not prevent a party plaintiff from stating the facts which entitle him to a single recovery in different counts, and so varying the form of the statement as to meet any possible state of proof. *Brinkman v. Hunter*, 73 Mo. 172, 178, 179; *Lancaster v. Insurance Co.*, 92 Mo. 460, 467, 5 S. W. 23.

No more perspicuous illustration of the rule last stated can be given than is afforded by the case first cited in support thereof. Certain telegraphic correspondence between the parties to the suit was declared upon in one count as an acceptance of a draft, and in the second count as a promise to accept. It is clear that the correspondence in question could not, in point of law, be both an acceptance and an executory agreement to accept. It was either the one or the other. Nevertheless the court held that the method of pleading was proper under the Missouri Code, and that, while there could be only one recovery or satisfaction, the court could not compel the plaintiff to elect upon which count of his petition he would proceed to trial. So, in the case at hand, the court had no right to compel the plaintiff to abandon one of its counts, and by so doing part with a possible right of recovery before any evidence had been adduced. If an election can be compelled in such cases as the one in hand, it certainly ought not to be enforced until all the evidence has been adduced; and even then we see no necessity for forcing an election, since it is always possible to submit both counts to the jury under proper instructions, advising them therein in an appropriate way that the plaintiff is entitled to but one satis-

faction, and that a finding for plaintiff on one count will necessarily compel them to find in favor of the defendant on the other. In the case at bar, and in all others of a similar character, where, by reason of the complexity of the transaction, it is permissible, as in the state of Missouri, to state a single cause of action in different ways to meet the proof, the practice last suggested is, in our judgment, the proper procedure.

It was suggested in the course of the oral argument, as we understood, that, although the plaintiff company had been compelled to abandon the first count of its petition, and submit to a judgment dismissing that count, yet the cause of action stated in that count was not barred by the adverse judgment subsequently rendered on the second count, and that the plaintiff was still at liberty to sue on the count which he had been forced to dismiss. If this proposition was tenable, it would serve to further convince us of the error that was committed in compelling an election, since the Missouri Code of Procedure (Rev. St. Mo. 1889, § 2040) permits a joinder of two or more causes of action in the same petition or complaint which arise out of "contract, express or implied," where they affect "all parties to the action," and do not "require separate places of trial." The two counts of the petition were founded on contracts existing between the plaintiff and the defendant, and did not require separate places of trial; hence, they were properly joined in one petition, and from the standpoint last mentioned, it was wrong to force an election, and compel two trials where one would have sufficed. The suggestion, however, that the plaintiff may still sue on the abandoned count does not seem to be tenable, since in such cases as the one in hand, where a plaintiff having the right to a single recovery states his case in two ways to meet the proof, a verdict and judgment rendered on either count is a bar to a suit on the other. This is the Missouri rule, which has been enforced by several local decisions. *Owens v. Railroad Co.*, 58 Mo. 386, 394; *Lancaster v. Insurance Co.*, 92 Mo. 460, 468, 5 S. W. 23; *Brownell v. Railroad Co.*, 47 Mo. 239. The result is, therefore, that the verdict on the second count, which was rendered in favor of the defendant below, would probably prevent the plaintiff from bringing another action; but, if such is not the result of that verdict, the judgment which was entered, dismissing the first count with costs, is apparently final as to that count if it is allowed to stand. The action of the trial court, therefore, in

compelling the plaintiff to elect as between the two statements of its cause of action which it thought proper to make, has deprived it of the right to a hearing on the first count, to which, as we think, it was clearly entitled. * * * *

The two counts, not having been tried together, must now be tried separately, to afford the plaintiff that opportunity for relief which the law requires.

The trial on the second count of the petition seems to have been conducted fairly, and no errors are assigned with respect thereto which would warrant a reversal of the judgment upon that count. The record shows that two judgments were in fact rendered,—one upon the first count, which was erroneous, because the plaintiff was wrongfully compelled to abandon that count; and one upon the second count, which is not affected by error. Under these circumstances, we think the judgment on the second count should be affirmed, and that the judgment dismissing the first count should be reversed, and the cause remanded for a new trial on the first count. It is so ordered.

SANBORN, Circuit Judge (dissenting): If the counts in a petition state facts which constitute different and inconsistent causes of action, the plaintiff should be compelled to elect upon which he will proceed to trial; but if he merely state in different ways, the same facts which constitute the same cause of action, no election should be required. It is an inconsistency in the facts stated which constitute the causes of action, and not in the ways of stating the same facts, which warrants the election. The authorities cited in the opinion of the majority sustain this rule. They were all cases where the facts constituted but one cause of action, and the counts were merely different ways of stating these facts. Thus the two counts in the petition in the case upon which the opinion of the majority seems to rest—the case of *Brinkman v. Hunter*, 73 Mo. 172, 176—were different ways of stating the legal liability upon a single telegram in these words: “We will pay Clark and Goldsby’s draft, six hundred eight dollars ninety-two cents.” As the Court said at page 179:

“In the first count the telegram of the defendants is declared upon as an acceptance by them for the sum of \$608.92. In the second count, the plaintiffs sue for a breach of a promise to accept contained in the telegram.”

Here was but a single cause of action, based on a single fact stated in different ways, so that there was no ground for an

election. There was no inconsistency in the facts upon which the two counts rested, because they were based upon the same facts. The distinction between such a case and one in which the facts stated in the counts of a petition are so different and inconsistent that, if those stated in one of the counts exist, the cause of action stated in the other cannot be, is plainly pointed out in the other decisions of the courts of Missouri cited in the opinion of the majority. In *Nelson v. Brodhack*, 44 Mo. 596, 599, the supreme court of that state said, in speaking of inconsistent defences:

"Some interpretation, then, of the term 'inconsistent defenses' should be adopted, if possible, that shall be consistent with the statute, and secure the rights of defense. That right will be secured if the consistency required be one of fact merely and if two or more defenses are held to be inconsistent only when the proof of the one necessarily disproves the other."

In *Roberts v. Railway Co.*, 43 Mo. App. 287, 289, Judge Rombauer, in delivering the opinion of the court said:

"The office of pleadings is to produce issues of fact or of law, and, as the proof in all cases must correspond with the allegations made, it would lead to the most absurd results if the plaintiff, in support of one count of his petition, were permitted to adduce evidence, the tendency of which is directly to contradict his averments in another count of the same petition. It results from the above, as the correct rule, that where several counts in the same petition are inconsistent, so that the proof of one necessarily disproves the other, the court should, if requested by the defendant to do so, and may of its own motion, compel the plaintiff at any time to elect on which one of the inconsistent counts he will proceed to trial."

There are three established tests for the determination of the identity of causes of action. They are: Will the same evidence support both? Will the same measure of damages govern both? And will a judgment against one bar the other? *Whalen v. Gordon*, 37 C. C. A. 70, 95 Fed. 305, 313; *Scovill v. Glasner*, 79 Mo. 449, 453; *McDonald v. Jackson*, 55 Iowa 37, 7 N. W. 408. Let us apply these tests to the causes of action pleaded in the petition in the case at hand. (1) One of these causes is for the recovery of \$65,000 for the breach of a contract to purchase coal at certain rates. The other is for the recovery of \$24,000, which the defendant promised to pay in compromise

settlement and discharge of the claim for the \$65,000. The only evidence necessary to prove the first cause of action is the contract of purchase, the refusal to perform it, and the profits lost. But this evidence will not sustain the second cause. That cause requires for its maintenance proof that the claim for \$65,000 was compromised and settled, and that the defendant agreed to pay \$24,000 in consideration of that settlement. Moreover, proof of these additional facts, necessary to the maintenance of the second cause of action, establishes the fact that the first cause does not exist, and that the liability upon which it rests has been settled and discharged. The proof of the second cause necessarily disproves the existence of the first. (2) The measure of damages in the first cause is the profits which the plaintiff would have made from the sale of coal. In the second cause it is the amount which the defendant promised to pay in compromise of the original claim. (3) A judgment that the second cause of action does not exist is no bar to the first cause. Witness the proposed order in this case affirming the judgment for the defendants on the second cause of action and permitting the plaintiff to proceed to recover a judgment on the first notwithstanding. Thus each of the three established tests shows that the causes of action in question here differ in the facts indispensable to their respective maintenance; that the variance does not consist in different ways of stating facts which constitute the same cause of action, but that the facts essential to the maintenance of the cause stated in the second count of the petition are fatal to the existence of that set forth in the first count; that the facts essential to the maintenance of the cause set forth in the first count are insufficient to sustain that pleaded in the second, and that a judgment against the cause stated in one of the counts is no bar to that pleaded in the other. In my opinion, the causes of action pleaded in the two counts of this petition were inconsistent, because the facts that were indispensable to the maintenance of the second were fatal to the first, and because a judgment against the second is no bar to the first. I agree with the trial Judge that the plaintiff was properly compelled to elect on which of these inconsistent causes he would proceed to trial, and I think the judgment below should be affirmed. *Babcock v. Harkins*, 23 Vt. 561, 564; *Henderson v. Boyd*, 85 Tenn. 21, 1 S. W. 498; *Perkins v. Hersey*, 77 Mich. 504, 513, 43 N. W. 1021; *Soap Works v. Sayers*, 51 Mo. App.

314, 316. The logical and necessary result of these views is that, inasmuch as the two causes of action were different and inconsistent, and the plaintiff was compelled to abandon the first without trial on its merits, he would be entitled to commence and to maintain another action thereon, notwithstanding the judgment below, so that the practical result in this case would differ from that prescribed only in the award of costs if the judgments were affirmed, and I think they should be.

RINARD v. O. K. C. & E. R. R. CO.

164 Mo. 270. [1901.]

MARSHALL, J.: This is an action for damages for the killing of plaintiff's husband, caused by a collision of two trains upon the defendant's road, near Galt, in Grundy County, on Dec. 23, 1897. The plaintiff obtained a verdict for five thousand dollars and the defendant appealed.

The amended petition contains three counts.

The first count alleges that Samuel W. Rinard, plaintiff's husband, was in the employ of the defendant as assistant roadmaster, and that it was his duty to pass over the defendant's road and to ride in its cars; that on Dec. 23, 1897, while riding in the caboose of one of defendant's trains, known as a work train, near Galt, it collided with another train on defendant's road, and he was injured so that he died. It further alleges "that the train upon which the plaintiff's said husband was riding was backing, going west from or near the city of Galt to the town of Dunlap; that the other said train so colliding with said work train was going east towards the city of Galt, and that whilst so running and moving in opposite directions upon the same track, said trains collided, the engine of the train so going east and the caboose of the work train aforesaid striking each other with great force." Then after alleging that the deceased was without negligence or fault, the petition charges that the collision was, "the result of and occasioned by the negligence of the servants, officers, agents and employees of defendant while running, conducting and managing said locomotives, cars and trains aforesaid."

The second count charges that the deceased was engaged "in

directing and managing divers other persons, and assisting them somewhat in the taking up of certain rails and ties upon defendant's roadbed and railway aforesaid, and in replacing and relaying the same with other rails and ties, and in doing and directing other things in and about defendant's roadbed and tracks; that said work was being done by certain person or persons, company or corporation, being styled and designated as the 'Missouri Railway Construction Company'; that whether said person or persons, corporation or company, was in fact defendant or an association of persons, composed of directors, officers or other persons connected with the defendant, or a mere myth, plaintiff is unable to say, and as to whether said work was being done under contract between defendant and said company—pretended or real—plaintiff is unable to state, but plaintiff avers the facts to be, that said work was being done with the knowledge and consent of the defendant and its officers. And plaintiff further avers the facts to be, that in the discharge and performance of her said husband's (Samuel W. Rinard) duties, it became necessary, as a part thereof, (as was well known by defendant) that he, said Rinard, ride from place to place upon said defendant's railroad upon defendant's trains, especially its work or construction train which said train was provided and furnished by the defendant to transport him (said S. W. Rinard) from place to place in safety over its said line of road where said S. W. Rinard, in the discharge of his duties aforesaid, was required to be and work, and that under said S. W. Rinard's employment aforesaid, he was required to work and be upon divers parts of the defendant's said roadbed and line of railway between the city of Trenton, in said Grundy County, and the city of Milan, in Sullivan county, Missouri." The collision and negligence is then charged as in the first count.

The third count charges that the defendant, for a valuable consideration, undertook to transport the deceased on one of its trains known as its "work extra" or "work train," from at or near the city of Galt to the village of Dunlap, and that while so riding the collision occurred. The negligence charged was as in the first count.

The original petition contained only the first count. When the amended petition was filed the defendant moved to require the plaintiff to elect on which count she would stand, and upon this motion being overruled, the defendant moved to strike out

the second and third counts, as being a departure from the original cause of action pleaded and as being inconsistent with the first count, and upon this motion being overruled, the defendant moved to require the plaintiff to make each count more definite and certain by specifying the officer, agent, or employee whose negligence occasioned the injury, and upon what particular train such officer was negligent, and this motion being overruled the defendant filed an answer, which is a general denial and a plea of contributory negligence. * * *

(II.) The refusal of the trial court to compel the plaintiff to elect upon which count in the petition she would stand, is assigned as error.

It is claimed that the counts are inconsistent, in that the first count alleges that deceased was an employee of the defendant as assistant roadmater, while the second count alleges that he was an employee of the Missouri Railway Construction Company, and the third count alleges that he was a passenger.

On the other hand, the plaintiff contends that the gravamen of the three counts is the negligent running of the trains—one or both—which caused the collision that produced the death, and that the character of the deceased's relation or non-relation to the defendant is immaterial as it is liable in any event, whether the deceased was its servant or that of the construction company or was a passenger, and, hence, that the cause of action is single and the same, but is stated in different forms in the three counts to meet any phase of the proofs, and, therefore, the plaintiff cannot be compelled to elect, and a general verdict for the plaintiff is good.

It is as true today as it ever was that repugnancy in pleading is not permissible. But to render a pleading bad the repugnancy must be such that proof of one state of facts pleaded as a basis for a recovery will necessarily disprove another state of facts pleaded as such a basis. A plaintiff may plead a single cause of action in as many different counts as he chooses, to meet any possible state of the proofs, and this will not make his counts repugnant. (*Brownell v. R. R. Co.*, 47 Mo. 239; *Brinkman v. Hunter*, 73 Mo. 172; *St. Louis Gas Light Co. v. St. Louis*, 86 Mo. 495; *Lancaster v. Insurance Co.*, 92 Mo. 460.) If any one of the counts in a petition so framed is good, it will support a general verdict. (*Idem.*) This being true, a plaintiff cannot be compelled to elect upon which count he will stand.

In the case at bar, the cause of action is single. It is not material whether the deceased was a servant of the defendant, or of the construction company, or a passenger, for his widow's right to recover is not impaired in either case, under the laws of this state as they now and were December 23, 1897, when the accident occurred. (Powell v. Sherwood, 162 Mo. 605.) There was no error in overruling the motion to elect. * * *

*Judgment affirmed.**

KOEPKE v. WINTERFIELD.

116 Wis. 44. [1902.]

This is an appeal from an order overruling a demurrer to the complaint alleging two causes of action. The first cause of action is to the effect that in consideration of the conveyance of a house and lot, described, to the defendant (with an encumbrance thereon), of the value of \$800, the defendant executed, acknowledged and delivered to the plaintiff a warranty deed, with full covenants, of 160 acres of land described, Jan. 15, 1901; that the land was at the time wild and unoccupied, and the defendant was not and never had been in the actual or constructive possession thereof, and had no title nor interest in or to the same or any part thereof, but that at the time of the execution and delivery of such deed the title and possession of the land and every part thereof were vested, held and owned by other parties, as therein alleged, and that the defendant had full knowledge of the existence of such outstanding title and possession at the time he so in form conveyed to the plaintiff; that, by reason of the facts stated, the plaintiff had suffered damage in the sum of \$800, for which amount, with interest from January 15, 1901, judgment is demanded. The second cause of action alleged is to the effect that the defendant obtained from the plaintiff the deed of the house and lot mentioned by falsely and fraudulently representing to the plaintiff that he was the owner of, and had the title in free simple to, the 160 acres of land

*Compare Drolshagen v. Union Depot Co., 186 Mo. 258.

described, that the same was of the value of \$800, when in fact its value did not exceed \$150, and that the same was free and clear from all encumbrances; that the plaintiff, relying upon and believing such representations to be true, conveyed the house and lot to the defendant, and received in exchange the said warranty deed of the 160 acres mentioned; that the defendant was not at the time the owner in free simple of the 160 acres of land, and had no title to or interest therein, but that the title thereof was, Jan. 15, 1901, in the parties named in the other cause of action, and had been for more than two years; and further reiterates the allegations contained in the first cause of action, and alleges damage to the plaintiff in the sum of \$800, and prays judgment for that amount, with interest from Jan. 15, 1901. The demurrer to the complaint is based upon the following grounds: (1) That several causes of action have been improperly united; (2) that the first cause of action alleged does not state facts sufficient to constitute a cause of action; (3) that the second cause of action stated does not state facts sufficient to constitute a cause of action; (4) that the complaint does not state facts sufficient to constitute a cause of action.

Cassoday, C. J. (after stating the facts and holding that the first count stated a good cause of action for breach of covenant, and the second count a good cause of action for fraud and deceit, says): 4. The remaining question is whether the two causes of action are improperly united. The statute declares that "the plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable, or both, where they arise out of (1) the same transaction or transactions connected with the same subject of action." Section 2647, Rev. Sts. 1898. It is very clear that the two causes of action both arose out of the same transaction,—the exchange of the house and lot for the wild and unoccupied land. The case comes within the principles of the recent rulings of this court, wherein it was, in effect, held that "a cause of action for the wrongful withholding of leased premises after a notice to quit, * * * and a cause of action for the wrongful conversion of personal property included in the same lease, by failure to deliver it to the lessor as therein provided, may be joined, * * * since they 'arise out of the same transaction or transactions, connected with the same subject of action.' " Elevator Co. v. Wells, 93 Wis. 5, (66

N. W. 796), as explained in *State v. Helms*, 101, Wis. 280, 283, 284, (77 N. W. 194); *Endress v. Shove*, 110 Wis. 133, 139, (85 N. W. 653). We must hold that the two causes of action were properly united.*

The order of the circuit court is affirmed.

GERTLER v. LINSKOTT.

26 Minn. 82. [1879.]

GILFILLAN, C. J.: The complaint sets forth two causes of action. The first is upon a contract between the plaintiff and the defendant, providing for and regulating the separate enjoyment by each of them, at alternate periods, of a mill, of which they were tenants in common, and also providing for the payment, by each, of an agreed part of the expenses in keeping the mill in a suitable condition for business. The second cause of action is in form for a tort, in wrongfully drawing off and diverting water from a stream and pond on which the "mills" which plaintiff and defendant were running and using were situated. To the complaint there is a demurrer, on the ground that several causes of action, to-wit, one upon contract, and one for tort, are improperly united.

There is no doubt that the two causes of action in this complaint cannot be united, unless within the first class specified in Gen. Sts. c. 66, § 98; that is, unless they are included in "the same transaction, or transactions connected with the same subject of action." As a general rule a cause of action upon contract cannot be joined to one for tort; and where they are joined, the joinder is improper unless it appear from the complaint that they come within the first class in that section, and so are excepted from the general rule. The phrase in the statute, "the same transaction, or transactions connected with the same sub-

*Accord: *Spangler v. Kite*, 47 Mo. App. 230.

Contra: *Seymour v. Lorillard*, 8 Civ. Pro. 90; see also, *Bank v. Grace*, 18 N. Y. S. 745.

In *Jamison v. Copher*, 35 Mo. 483, it was said that a count for fraud and deceit in the sale of a note could not be joined with one based on the defendant's liability as indorser, but the question of both causes of action arising out of the same transaction was not discussed.

ject of action," is very indefinite, and it is difficult to define satisfactorily the causes intended to be covered by it. But it is evident that where a cause of action of one class is stated, the statement of another cause of action belonging to another class must show that they are parts of the same single transaction, or of a series of transactions all connected together, not independent of each other, and all connected with the same subject of action. The complaint in this case does not meet this requirement.

The facts stated in a first cause of action will not help the statement of a second, except so far as the statement of them in the first is referred to in, and made by such reference a part of, the statement of facts in the second. In this case neither cause of action refers to the facts stated in the other. We might conjecture that the "mills" mentioned in the second are the same as the mill or mills mentioned in the first. That is as far as we could get towards finding a connection between the two causes of action, even if it were permitted to indulge in conjecture, and that would be far from enough to justify the two causes in one action. The demurrer was well taken.

Order reversed.

WILES v. SUYDAM.

61 N. Y. 173. [1876.]

CHURCH, Ch. J.: The ground of demurrer relied upon is that several causes of action are improperly united. The complaint contains but one count composed of a series of allegations, and was doubtless framed upon the theory that there is but one cause of action contained. If, however, the complaint does contain several causes of action, and they are improperly united, the omission to state the causes of action in separate counts properly numbered does not deprive the defendant of the right to demur. (*Goldberg v. Utley*, 60 N. Y. 427.) The complaint alleges an indebtedness against the Imperishable Stone Block Pavement Company of New York City, which had been prosecuted to judgment and execution; that the defendant was a "stockholder to the amount of \$50,000," but had not paid for the same, and that no certificate had been made and recorded that the capital was paid in. Section 10 of the act authorizing

the formation of corporations for manufacturing and other purposes declares that until such certificate is recorded the stockholders shall be liable for the debts of the company to the amount of their stock respectively. The complaint also alleges that the time the debt was contracted and ever since, the defendant was a trustee of the corporation, and that no report was filed on the 1st day of January, 1873, nor at any time since, and for this neglect the twelfth section of the act aforesaid declares that the trustees shall be liable for all the debts of the corporation then existing, or which may be thereafter created, until such report is filed.

It is insisted by the counsel for the plaintiff that this constitutes but one cause of action, and he argues that the cause of action is to recover the debt upon two grounds of personal liability created by statute. I am unable to concur in this view. The recovery of the debt is the object of the action, but a cause of action must have two factors, the right of the plaintiff and the wrong or obligation of the defendant. These must concur to give a cause of action. The cause of action against the defendant as a stockholder, consists of the debt and the liability created by statute against stockholders when the stock has not been paid in and a certificate of that fact recorded. In effect the statute in such a case withdraws the protection of the corporation from the stockholders, and regards them liable to the extent of the amount of their stock as co-partners. (*Corning v. McCullough*, 1 N. Y. 47.) The allegations in the complaint are sufficient to establish a perfect cause of action against the defendant as a stockholder primarily liable for the debts to the amount of his stock. The allegations against the defendant as trustee also constitute a distinct and perfect cause of action, but of an entirely different character. Here the liability is created by statute and is in the nature of a penalty imposed for neglect of a duty in not filing a report showing the situation of the company. The object of the action is the same, viz., the collection of the debt; but the liability and the grounds of it are entirely distinct and unlike. That there are two causes of action in this complaint seems too clear to require much argument. The more difficult question is, whether they may be united in the same complaint. The first cause of action against the defendant as a stockholder is an action on contract. The six years' statute of limitations applies. (1 N. Y. *supra*.) The de-

defendant is entitled to contribution. (3 Hill, 188.) But in respect to the action against defendant as trustee, this court held in Merchants' Bank v. Bliss (35 N. Y. 412), that the three years' statute of limitations applied under the following provision of the code: "An action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved." (§ 92.)

With this decision before us, which we do not feel at liberty to overrule, this cause of action must be regarded as an *action upon a statute for a penalty or forfeiture*. The liability is far more extensive than that of the stockholder; it is for all debts, while the former is limited to the amount of the stock. The defendant would not be entitled to contribution except by statute (Laws of 1871, p. 1435), and contributions would be from different persons than in the other case. It is claimed also that execution against the person might issue and this would seem to follow from the decision in 12 New York (*supra*) but we do not deem it necessary to pass upon that question. If these actions may be united it must be by virtue of the first subdivision of section 167 of the code. From the nature of the two actions they do not come under either of the other subdivisions. The first subdivision reads as follows: "The plaintiff may unite in the same complaint several causes of action whether they be such as have been heretofore denominated legal or equitable, or both, when they all arise out of: 1st. The same transaction or transactions connected with the same subject of action." This language is very general and very indefinite. I have examined the various authorities upon this clause, and I am satisfied that it is impracticable to lay down a general rule which will serve as an accurate guide for future cases. It is safer for courts to pass upon the question as each case is presented. To invent a rule for determining what the "same transaction" means, and when a cause of action shall be deemed to "arise out of it," and what the same "subject of action means," and when transactions are to be deemed connected with it, has taxed the ingenuity of many learned judges, and I do not deem it necessary to make the effort to find a solution to these questions. An interesting chapter on this clause is contained in a recent work by John M. Pomeroy, on "Remedies and Remedial Rights" (p. 496), which contains a review of all the authorities, and a critical analysis of the language with definitions and suggestions which will be useful in determining particular cases. Judge

Comstock says of this clause: "Its language is I think well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretation which shall be found most convenient and best calculated to promote the ends of justice." (17 N. Y. 592.) There is certainly ample scope for construction, but it is sometimes difficult to determine what interpretation will best promote the ends of justice. It is probable that the primary purpose of this provision was intended to apply to equitable actions, which frequently embrace many complicated acts and transactions relating to the subject matter of the action, which it would be desirable to settle in a single controversy. The clause was not intended to overturn all distinctions in actions and rules of pleading, and this court has held that an action of trespass, in breaking into a house and opening a trunk, could not be joined with an action on a covenant in a lease for quiet enjoyment, although the act which rendered the defendant liable in both actions was the same. (56 N. Y. 332.) In this case it is attempted to unite an action on a statute for a penalty with an action on contract. The nature of the two actions are essentially different, although the object to be attained is the same. The facts to establish the liability are entirely unlike. The measure of liability is different; the defenses are different. The rights of the defendant may be seriously prejudiced. Suppose a general verdict is obtained, from whom would the defendant seek contribution, from his co-trustees or from his co-stockholders? Can it be said that these causes of action arose out of the same transaction? If so, what was the transaction? Was it the formation of the company? That created no liability nor cause of action. Was it the debt of the plaintiff? That created no liability against the trustees, nor does such liability arise out of it. Was it the failure to file a certificate that the stock was not paid in? If so, there is no connection between that and the transaction which created the liability against the defendant as trustee. An omission to record a certificate that the stock was paid is not, in any sense, the same transaction as the neglect of trustees to file a report of the financial condition of the company. Without attempting to define the terms of the last clause, I do not think that there is any such connection between the transactions, out of which the causes of action arose in this case, and the "subject of action" as to justify uniting of the two causes of action.

The causes of action are independent of each other; the "transactions" are different, and there is no legal affinity between them. The language of the last clause is more applicable to equitable actions where the controversy is in respect to specific property, real or personal. It is difficult to define in this case the "subject of action." The object of the action is to recover the debt; but is the debt the subject of action? In some sense it, perhaps, may be so regarded; while in another the subject of action may be regarded the penalty or forfeiture. If the former, there is no natural connection between it and the transaction creating the liability. If the latter, it has no connection with the transaction against the defendant as a stockholder. The language of the last clause, it seems to me, has no application to this case, and I am confident it was never intended by it to force a connection between such distinct and independent things. It may be convenient for the plaintiff to combine the two causes of action, but, looking at the rights of both parties and the rules of law, we cannot think that the code was designed to authorize their union in one complaint.

The judgment must be reversed and the demurrer sustained, with leave to the plaintiff to amend within the usual time.

Judgment accordingly.

CRAFT REFRIGERATING CO. v. QUINNIPIAC BREW-
ING CO.

63 Conn. 551. [1893.]

Action by the Craft Refrigerating Machine Company against the Quinnipiac Brewing Company to recover damages for a breach of contract of sale of refrigerating machines by plaintiff to the defendant, and for a conversion of such machines. From a judgment of non-suit, plaintiff appeals.

The complaint alleged, in substance, that plaintiff sold and delivered to defendant two refrigerating machines at a certain agreed price; that the latter claimed the machines did not comply with the contract, and directed plaintiff to remove them; that plaintiff agreed to take them back, and sent for them; and that defendant forcibly prevented it from taking the machines,

and continued to use them as its own property, and thereby converted them. * * * * The court required plaintiff to elect on which cause of action it would proceed, on the ground that the two causes of action,—one on contract, and the other sounding in tort,—could not be stated in a single count. Plaintiff refused to make such election, and a judgment of non-suit was entered.

BALDWIN, J. Complaints, under the practice act, are to “contain a statement of the facts constituting the cause of action.” Gen. St. § 872. This is to be “a plain and concise statement of the material facts on which the pleader relies.” Id. § 880. “Acts and contracts may be stated according to their legal effect.” (Practice Book, p. 14, rule 3, § 1), and “the plaintiff may claim alternative relief, based upon an alternative construction of his cause of action.” (Id. p. 13, rule 2, § 9). Several causes of action may be united in the same complaint if all are “upon claims, whether in contract or tort, or both, arising out of the same transaction or transactions connected with the same subject of action; but they must be separately stated,” and “if it appear to the court that they cannot all be conveniently heard together, the court may order separate trials of any such causes of action, or may direct that any one or more of them be expunged from the complaint.” Gen. St. § 878. “Transactions connected with the same subject of action may include any transactions which grow out of the subject matter in regard to which the controversy has arisen; as, for instance, the failure of a bailee to use the goods bailed for the purpose agreed, and also an injury to them by his fault and neglect.” Practice Book, p. 15, rule 3, § 7. Where separate and distinct causes of action (as distinguished from separate and distinct claims for relief, founded on the same cause of action or transaction) are joined, “the complaint is to be divided into separate counts.” Id. p. 12, rule 2, § 4. Any exception for misjoinder of causes of action, whether in the same or separate counts, must be taken by demurrer, and, if not so taken, will be deemed to be waived. Id. p. 17, rule 4, § 13. These various statutory provisions and rules of court are all designed to enable the plaintiff to state his grievance to the court, untrammelled by artificial forms of pleading, and regardless of most of the ancient distinctions of procedure as to law and equity or contract and tort. There is no attempt to bring the parties to issue upon some “single, cer-

tain and material point." Each paragraph of the complaint is to contain "as nearly as may be a separate allegation" (Gen. St. § 880) and it is declared that, "the denial of any material allegation shall constitute an issue of fact" (Practice Book, p. 17, rule 4, § 12). If, in any case, so many of these issues are formed that the court fears the jury cannot dispose of them all at one hearing, it "may order that one or more of the issues joined be tried before the others." Gen. St. § 1032. And, if the issues made up by the parties are indefinite or indecisive, the court may direct them "to prepare other issues, and such issues shall, if the parties differ, be settled by the court." Id. § 880.

The plaintiff's complaint sets forth two causes of action, stating them in separate paragraphs, but not in separate counts. One cause of action is for the breach of a contract to take, and pay for, two refrigerating machines, at an agreed price. The other cause of action is for a conversion of the machines. It was proper to join these different causes of action in one complaint, either if both arose out of the same transaction, or if, while one arose out of one transaction, and the other out of another, both these transactions were "connected with the same subject of action." A transaction is something which has been transacted, that is, acted out to the end. This notion of completed action strongly characterizes the word in the Latin language, from which, through the Normans, we have derived it, although we gain little assistance otherwise from these sources in determining its meaning, since both the Romans and the French have used it mainly as a juridical term in signifying an agreement of parties in the settlement of differences. Dig. II, 15, "De Transactionibus"; Civil Code of France, art. 2044. As the word is employed in the American codes of pleading and in our own practice act, a "transaction" is something which has taken place, whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered. The transaction between the parties to the present action began when they made the contract for the manufacture and sale of the two machines. Then followed the delivery of the machines, the refusal to accept them, the attempt of the plaintiff to retake them, the forei-

ble prevention of their removal, and the subsequent continuance of their use in the defendant's business. Without taking each and all of these events into consideration, the legal relations of the parties could not be fully determined. From the delivery of the machines to the commencement of the action, they had remained continuously in the defendant's possession. It had simply dealt with them in a different way at different times. The practice act is to be "favorably and liberally construed as a remedial statute." Practice Book p. 21, rule 9, § 4. It has taken the word "transaction," not out of any legal vocabulary of technical terms, but from the common speech of men. So far as we are aware, it has never been the subject of any exact judicial definition. It is therefore to be construed as men commonly understand it, when applied, as in our practice act it certainly is applied (Gen St. §878), to any dealings between the parties resulting in wrongs, without regard to whether the wrong be done by violence, neglect, or breach of contract. It seems to us hardly to be doubted that any ordinary man would consider everything stated in the complaint as properly belonging to a narrative of the whole transaction between the parties, and necessary for the information of one who was to form a judgment as to their respective rights. That a broader meaning should be given to the term "transaction" than it has received in some of the courts of our sister states is plain from the provision in the Practice Book (p. 13, rule 2, § 7) that "where several torts are committed simultaneously against the plaintiff (as a battery accompanied by slanderous words) they may be joined as causes of action arising out of the same transaction, notwithstanding they may belong to different classes of actions." This was the deliberate adoption of a view of the meaning of the word in question which had been previously disapproved in New York, as well as by Judge Bliss, in his treatise on Code Pleading (section 125), though accepted in Kansas. *Anderson v. Hill*, 53 Barb., 238,245; *Harris v. Avery*, 5 Kan., 146. It follows that both causes of action declared on were properly united in one complaint. The same result would also be reached if what we have viewed as one transaction could be regarded as consisting of several transactions, since all would be connected with the same subject of action; that is, the two machines, and the title to them. * * *

Judgment affirmed on technical grounds.

HARRIS v. AVERY.

5 Kan., 146. [1869.]

VALENTINE, J. This action was brought in the court below by Avery, as plaintiff. The petition states two causes of action,—false imprisonment and slander,—and alleges that both arose out of the same transaction. Harris demurred to this petition, on the ground “that it appears on the face of the petition that several causes of action are improperly joined.” The district court overruled the demurrer, and this ruling is assigned as error. The petition shows that the two causes of action are founded upon the following facts: Harris met Avery in the City of Fort Scott, and, in the presence of several other persons, called Avery a thief; said he had a stolen horse; took the horse from Avery, and kept the horse for four or five days; arrested Avery, and confined him in the county jail with felons four or five days. We think these facts, as detailed in the petition, constitute only one transaction (*Brewer v. Temple*, 15 How. Pr. 286); and whether they constitute more than one cause of action, under our code practice, may be questionable. Under the authority we have referred to they would not. But as we have not been asked to decide the latter question, we will pass it over and treat the case as though the facts stated constitute two causes of action.

Section 89 of the Code (Comp. Laws, 138), provides “that the plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in either one of the following classes: First, the same transaction or transactions connected with the same subject of action.” This differs in many respects from the common law rule. At common law, “where the same form of action may be adopted for several distinct injuries, the plaintiff may, in general, proceed for all in one action, though the several rights affected were derived from different titles,” (1 Chit. Pl. 201; *Tidd*, Pr. 11); and different forms of action may be united, “where the same plea may be pleaded and the same judgment given on all the counts of the declaration, or whenever the counts are of the same nature, and the same judgment is to be given on them, although the pleas be different.” 1 Chit. Pl. 200.

In the action at bar, if Harris had arrested Avery on a warrant, which Harris had maliciously and without probable cause obtained from a court of competent jurisdiction, and had also converted the horse to his own use, then at common law Avery would have had three distinct causes of action, which he could unite in one suit: First, an action for the false imprisonment or malicious prosecution; second, an action of slander for the words spoken; and, third, an action of trover for the conversion of the horse. These may all be united in an action on the case, (1 Chit. Pl. 133, 134, 146; 1 Tidd, Pr. 5) trover being a species of case. Avery might, also, at common law unite with these causes of action as many other causes of action as he might have, for malicious prosecution, slander, trover, criminal conversation, nuisance, and other causes of action which may be sued in an action on the case, and although they may each have arisen out of a different transaction, and at a different time, and in a different place. But if Harris arrested Avery without any process—which was the fact in this case—and in an entirely irregular manner, then the two causes of action for false imprisonment and slander could not at common law be united, as the first would have to be sued in an action of trespass and the second in an action on the case, and it would make no difference whether they both arose out of the same transaction or not. Our code has abolished all the common law forms of action, and has established a system for the joinder of actions,—more philosophical, and complete within itself. It follows the rules of equity more closely than it does those of the common law, one object seeming to be to avoid the multiplicity of suits, and to settle in one action, as equity did, as far as practicable, the whole subject matter of a controversy. Hence, the common law on this question is no criterion. It is probably true that the two causes of action for false imprisonment and slander cannot, under our code, be united, unless both arise out of the same transaction, one being an injury to the person and the other being an injury to the character; but we do not know of any reason why they should not be united when both do arise out of the same transaction. It is claimed by counsel for the plaintiff in error that the earlier cases under the New York Code are against this view of the case. He refers to *Furniss v. Brown*, 8 How. Pr., 59, 73; *Hulse v. Thompson*, 9 How. Pr., 113; *Jeroliman v. Cohen*, 1 Duer, 629. We think it questionable whether these

cases sustain the counsel's views; but if they do, the later decisions under the same code are squarely against him. See *Brewer v. Temple*, 15 How. Pr. 286; *Robinson v. Flint*, 16 How. Pr. 240. In the latter case the court, as we think, express the true rule. They say "that the plaintiff may unite—First, as many legal causes of action as he pleases arising out of the same transaction; second, as many equitable causes of action as he pleases arising out of the same transaction; third, as many legal and equitable causes of action as he pleases arising out of the same transaction; fourth, as many causes of action as he pleases arising out of different transactions connected with the subject of the action."

The order of the district court overruling the demurrer to the petition is affirmed.

DEWOLFE v. ABRAHAM.

151 N. Y., 186. [1896.]

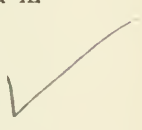
BARTLETT, J. The plaintiff sued the defendants, merchants in the city of Brooklyn, for slander, alleging that, at their place of business, and in the presence and hearing of a large number of people, the defendants, through their lawful agents, charged plaintiff with theft, in that she had stolen from them a certain ring. The plaintiff's counsel in opening the case to the jury, stated that the alleged slander was not uttered by the defendants, or either of them, but by a clerk or salesman in their employ, that plaintiff, at the time of the slander was falsely imprisoned by a detective of defendant's; and that the plaintiff sought to recover damages for the false imprisonment and for slander. Thereupon the counsel for defendants moved, upon the complaint and the opening, for a dismissal, upon the ground that the defendants were not liable for the slander of their clerks, and that the complaint was solely for slander. This motion was denied, and the plaintiff was allowed to withdraw a juror for the purpose of applying to the special term for leave to amend her complaint, so as to allege a cause of action for false imprisonment against the defendants. A motion was accordingly made at special term, and the justice presiding held that the proposed amended complaint contained a union of the causes

This is an extreme case, so E. W. H. Better to let the be joined since in separate recoveries one act would be sufficient to recover damages in each

of action for slander and false imprisonment, and denied the motion. On appeal, the appellate division reversed the order of the special term, and allowed the amendment, holding that "injury at the same time to the person by physical violence and to the character by the language may well be regarded as parts of a single tort." The question of law is certified to us, "whether, under all the circumstances of the case, the plaintiff should have been allowed to amend her complaint for slander by adding thereto the statement of a cause of action for false imprisonment."

We are unable to agree with the conclusion, reached by the learned appellate division, that injury at the same time to the person by physical violence and to the character by language may well be regarded as parts of a single tort. We think to so hold is to ignore a distinction that exists in all jurisdictions where the common law is administered. It is not necessary, however, to examine precedents, as the code of civil procedure (section 484) is decisive of this appeal. This section provides that the plaintiff may unite in the same complaint two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as set forth in nine subdivisions. The second, third and ninth are the only ones material to this controversy. They read as follows: "(2) For personal injuries, except libel, slander, criminal conversation or seduction. (3) For libel or slander. * * * (9) Upon claims arising out of the same transaction or transactions connected with the same subject or action and not included within one of the foregoing subdivisions of this section." The section then provides generally "that it must appear upon the face of the complaint that all the causes of action so united belong to one of the foregoing subdivisions of this section." It thus appears that the legislature has indicated with great clearness and particularity the causes of action that may be united in the same complaint. The test is very simple, as all causes of action united must belong to the same subdivision of the section we are considering. False imprisonment is an injury to the person, and is embraced within subdivision 2, while slander is in express terms excluded therefrom, and placed in subdivision 3. The plaintiff's case is not aided by subdivision 9 of the section, which provides for uniting causes of action upon claims arising out of the same transaction. It does not follow

that two causes of action, originating at the same time, arose, as a matter of law, out of the same transaction, or are proved by the same evidence. *Anderson v. Hill*, 53 Barb., 245, 246. In the case last cited the general term of the supreme court held that causes of action for assault and battery and slander could not be united in the same complaint. Mr. Pomeroy, in his work on *Code Remedies* (section 474), in commenting on that case, says: "Two events happened simultaneously, the beating and the defamation, but neither was a 'transaction,' in any proper sense of the word. The wrong which formed a part of one transaction was the beating; that which formed a part of the other was the malicious speaking. The plaintiff's primary rights which previously existed were broken by two independent and existing wrongs. The only common point between the causes of action was one of time, but this unity of time was certainly not a 'transaction.' " The separate and distinct nature of the causes of action of false imprisonment and slander are apparent when we apply the test, under the circumstances of the case at bar, whether the same evidence would prove the plaintiff's case in the two actions. It is obvious that it would not. In the action for false imprisonment, plaintiff must show an unlawful arrest and detention. In the action for slander, the proof would be the uttering of the slander in the presence of others, its falsity, if justified, and extrinsic evidence of malice, if any existed. The measure and proof of damages in the two causes of action would be entirely different. The order appealed from should be reversed, with costs, the order of the special term should be affirmed, and the question of law certified to us is answered in the negative. All concur. Ordered accordingly.



CHAPTER IV.

THE ANSWER.

CODE PROVISIONS:

Answer; what to contain.—The answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. 2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.—*N. Y. Code, Civ. Proc., Sec. 500.*

Answer shall contain, what.—The answer of the defendant shall contain: First, a general or specific denial of each material allegation of the petition controverted by the defendant, or any knowledge or information thereof sufficient to form a belief; second, a statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition.—*Mo. R. S., 1899, Sec. 604.*

Counter-claim defined.—The counter-claim, specified in the last section, must tend in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:

1. A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract, existing at the commencement of the action.—*N. Y. Code, Civ. Proc., Sec. 501.*

Counter-claim must arise from what.—The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: First, a cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the sub-

ject of the action; second, in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. The defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, in such manner that they may be intelligibly distinguished, and refer to the cause of action which they are intended to answer.—*Mo. R. S., 1899, sec. 605.*

Defendant may interpose several defenses or counter-claims; rules relating thereto.

A defendant may set forth in his answer, as many defenses or counter-claims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defense or counter-claim must be separately stated, and numbered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer.—*N. Y. Code, Civ. Proc., Sec. 507.*

When defendants shall answer jointly.—Two or more defendants, making the same defense, shall answer jointly. Different consistent defenses may be separately stated in the same manner.—*Mo. R. S., 1899, Sec. 606.*

Section 1. General and Specific Denials.

BOMBERGER v. TURNER.

13 *Ohio St.*, 263. [1862.]

The defendant in error filed his petition, in said superior court, against the plaintiffs in error and one William M. Seely, setting forth the rendition of a decree in Montgomery common pleas, in 1849, against said Seely, and in favor of said Clyne for \$1,191.05 and costs of suit, and a revival of that decree in 1856, in the name of said administrator; that Seely has no property subject to levy, but that, during the pendency of said first suit, he was the owner of lot No. 988, in the city of Dayton, and combined with one George W. Bomberger, his attorney and friend, to defraud said Clyne, and prevent the collection of his anticipated judgment; that, in furtherance of such combination,

the two went to Troy, Miami county, where judgments, wholly without consideration, were confessed by said Seely, before a justice of the peace, in favor of said Bomberger, for \$297.75; that executions thereon against the lands of said Seely were awarded by the Miami common pleas, upon which said lot No. 988 was sold to said Bomberger, who purchased the same under an express agreement to take the title and hold it in trust for said Seely; that Bomberger died long after said sale, but without having received any deed for said lot; that, in 1852, a deed was made to the plaintiffs in error, as his heirs at law. The petition asks that said sale and conveyance be adjudged fraudulent and void as against said judgment, and that the lot be sold to satisfy the same.

PECK, J. * * *

4. It is insisted that the court also erred in rendering judgment for plaintiff below, without proof that Seely had no property subject to levy, that fact having been put in issue, it is said, by the pleadings.

The petition avers, that, "the said Seely has no property whereon to levy," while the answer says merely, "these defendants *do not admit* that said Seely has no property on which to levy." Here certainly is no *denial* of the averment, much less any *affirmation that Seely had such property*, the proper way to controvert such negative averment. Nor is there any reason stated for the absence of such affirmation or denial. There was then no such controverting of the averment, as put the plaintiff upon proof of its truth. Code, sec. 127. A mere call for proof *unaccompanied by a denial*, would not have imposed such obligation upon the plaintiff. Bentley v. Dorcas, 11 Ohio St. Rep., 309.

Judgment reversed on other grounds.

WADLEIGH v. MARATHON COUNTY BANK.

58 Wis., 546. [1883.]

LYON, J. 1. Did the circuit court err in denying plaintiff's motion for judgment, for the alleged frivolousness of the original answer? If the answer was frivolous—that is, if it contained no denial of any material allegation of the complaint—

the motion should have been granted, or, at least, the defendant should have been required to make a better answer. Moreover, if it is frivolous the amended answer does not deny, and therefore admits that the plaintiff had title in fee to the land described in the complaint, down to the time when the tax deed was issued to Putman, as therein alleged. If that tax deed was successfully impeached, the title would still remain in the plaintiff, and he would be entitled to recover in this action for the logs admitted to have been taken from such land by the defendant. The point made against the original answer is that it contains no direct denial, but only an averment that the defendant says it denies, etc. This form of denial was held insufficient by some of the courts of New York during the early years of the Code. But the rulings there are not uniform. In *Chapman v. Chapman*, 34 How. Pr., 281, the point was ruled the other way. This is the latest ruling on the question in that state, to which we have been referred.

This case, however, does not require us to choose between the conflicting decisions in New York. It is not, we think, a fair construction of the answer to hold that it merely states that the defendant "says it denies," etc. It commenced with the introductory statement that the defendant comes by its attorneys, "and for answer to the complaint of the plaintiff alleges—;" then follows a direct denial in another sentence: "Upon information and belief it denies," etc. The signification of the pleadings would not be changed did it read, "The defendant alleges as follows, to-wit: Upon information and belief it denies," etc. We cannot doubt that this would be a sufficient denial.

The intention of the pleader to deny all of the material allegations of the complaint, except the incorporation of the defendant, is very manifest, and we think he has expressed that intention in the answer. The statute (Rev. St., § 2668) requires a liberal construction to be given to pleadings, with a view to substantial justice between the parties. Another statute (sec. 2829) commands us to disregard defects in pleadings which do not affect the substantial rights of the adverse party. Under these statutes it must be held that the original answer contains a sufficient general denial of all unadmitted material allegations of the complaint. It therefore puts in issue the title of the plaintiff to the lands and logs in controversy. * * *

Judgment affirmed.

SHELDON v. MIDDLETON.

10 Iowa, 17. [1859.]

The plaintiff sued on a promissory note for \$185.00, dated 1st September, 1857, made by Middleton to "Mark Weaver," payable one day after date, and which was indorsed in express terms to the plaintiffs. The defendant, by his answer, admits the making of a promissory note at the time specified, "similar in tenor to the copy declared on, but whether the same is the identical note, and his signature genuine, are matters with which he is unacquainted, and he requires the plaintiff to prove the same." He then denies owing \$203.50, as alleged, and denies that the note is the property of plaintiffs, and says he verily believes the plaintiffs hold the same as collateral security to a debt due by one Wm. Dishon to plaintiffs, and that they are not entitled to sue thereon, and have only a special temporary lien and property in the note; and calls for a reply under oath, but does not make oath to his answer.

The plaintiffs demurred to the answer in its several parts, and upon several grounds, and the demurrer was sustained. The defendant declined answering over, and judgment was rendered for the plaintiffs, and the defendant appealed.

WOODWARD, J.. It will not be necessary to examine the demurrer in its details. That which the defendant claims as a denial of the execution of the note is insufficient. It is uncertain and does not amount to a denial. If he desired to see the note, he should crave an inspection of it. Without an affidavit he might deny so far as to enable him to offer evidence against it, but his answer must be an explicit denial. *Lyon v. Bunn*, 6 Iowa, 48.

The facts pleaded by the defendant to show that the note is not the property of the plaintiffs are insufficient. If the note is in their hands as security, they may sue upon it. The indorsement places the legal property in them.

The denial that he owes the sum of \$203.50 is not sufficient. It is only a denial that he owes that particular sum. *Mann v. Howe et al.*, 9 Iowa, 546.

Judgment affirmed.

HOFFMAN v. EPPERS.

41 Wis., 251. [1876.]

This action is to recover damages for an assault and battery alleged to have been committed by the defendant upon the plaintiff. The complaint sets out at considerable length the particulars of the alleged battery, and certain facts attending it, which are only material on the question of damages. The answer is that, "the defendant is not guilty of the grievances in the plaintiff's complaint alleged, or any or either of them, or any part thereof."

The plaintiff objected, on the trial, to the admission of any evidence under the answer, on the ground that it contains neither a general nor a specific denial of any of the allegations of the complaint. * * *

LYON, J. No formula of a general denial is given in the statute, and hence any words which fairly import a denial of all the averments of the complaint, is a good general denial. We think such is the import of the answer in the present case. Certainly the pleader so intended it, and it is scarcely possible that the counsel for the plaintiff could have been misled by it. The answer is in the form of the general issue, under the common law system of pleadings, in actions on the case for torts; and such form has a definite, well settled and well understood signification. Construed with a view to substantial justice between the parties, we find no difficulty in holding the answer a good general denial. R. S. ch., 125, Sec. 21. * * *

Judgment affirmed.

CLARK v. FINNELL.

16 B. Monroe (Ky.), 329. [1855.]

Chief Justice MARSHALL delivered the opinion of the court.

Finnell, Kinkad, and Winston, commissioners appointed by the Kenton Circuit Court to close the affairs of the Kentucky Trust Company Bank, under the 3d section of an act to amend the charter of said bank, approved January 2, 1852, (Session Acts,

14), brought this action by petition against Clark, the acceptor, Robbins, the drawer, and Mack and Payson, indorsers, of a bill of exchange for \$7,321.40, dated at Cincinnati, October 6, 1854, payable thirty days after date, at the Mechanic's Bank of New York, and addressed to Clark at the New England Bank, Boston, Massachusetts. Process upon the petition was served upon Robbins and Payson alone, but Mack united with them in filing an answer sworn to by these three, and a demurrer having been sustained to each paragraph of the answer, judgment was rendered against the defendants without naming them, for \$7,321.40, with interest from the 6th day of November, 1854, and for seventy-five cents, the cost of protest, together with the costs of the suit. * * *

The material questions, however, arise on the demurrer to the answer. The first paragraph says the defendants do not owe, and ought not to pay, the amount of the bill, "*for they do not admit the regular protest thereof, and notice, etc.,*" as charged in the petition, and require proof, etc. This paragraph of the answer is clearly insufficient under the rule prescribed by the *2d and 3rd clauses of section 125 of the Code*. It neither sets forth new matter, as allowed by the 3rd clause, nor contains a denial of any allegations contained in the petition, nor of any knowledge or information thereof sufficient to form a belief. That the defendants do not admit a certain fact, and call for proof, etc., is not a denial, nor sufficient, under the Code, to put in issue a fact as to which the defendants might have knowledge or belief. The general statement that the defendants do not owe, when the petition merely states the facts from which indebtedness or liability is implied by law, is no proper response to the petition, because it neither denies any allegation of fact, nor states any new matter constituting a defense. But if it were allowed to be good in analogy to the plea of *nil debit* or *non assumpsit*, it might authorize a defense to be made, in the evidence of which there was no indication in the answer. And the object of the Code is that the pleadings shall state facts, and not mere implications of law. The court, therefore, properly sustained the demurrer to the first paragraph of the answer, and for the same reasons it properly rejected the proposed amendment, which in form and substance was nothing but a plea of *nil debit*.

Judgment affirmed.

MANNY & CO. v. FRENCH.

23 Iowa, 250. [1867.]

COLE, J. The petition is in the usual form. It avers the execution of the note by the defendant to the payee; that the payee for a valuable consideration, duly indorsed and transferred the note to the plaintiff, and that the same was, less a specified credit, due and unpaid. A copy of the note and indorsement is given. The petition was sworn to.

The defendant filed his answer in three counts, first, admitting the execution of the note as stated; second, "and whether the said petitioner is the owner of said note he has not sufficient information to form a belief, therefore he cannot admit or deny the same." Third, the answer claimed set-off as to a part of the note. The answer was sworn to. The plaintiff admitted the set-off and moved for judgment on the pleadings. The court sustained the motion and rendered judgment accordingly. * * *

There was no error in the action of the court. Our Code provides (Rev. § 2880) that the answer shall contain, "second, a general denial of each allegation of the petition, or else of *any knowledge or information* thereof sufficient to form a belief.
* * *"

The second count of the answer, fails to make any issue to be tried by a jury or otherwise, for the reason that it does not deny that defendant has *knowledge* but only that he has not *information* sufficient to form a belief; the Code requires both, and the answer contains but one. See *Ketcham v. Lyerega*, 1 E. D. Smith (N. Y.), 553; *Edwards v. Lent*, 8 How. Pr., 28; *Elton v. Markham*, 20 Barb., 343; *Smith v. Greenin*, 2 Sandf. S. C., 702.

Our system of pleading is essentially a *fact* system; it is furthermore a system adapted only to *substantial* issues, and cannot properly or successfully be diverted to *sham* defenses.

Affirmed.

HIGGINS v. GRAHAM.

143 Cal., 131. [1904.]

SMITH, C. This suit was brought on a promissory note, dated July 30, 1896, and due two months after date, for the sum of \$375. The defendant had judgment, from which, and from an order denying his motion for a new trial, the plaintiff appeals.

The only question involved is as to the statute of limitations, and this turns entirely upon the effects of the pleadings, findings, and judgment. The note is set out in the complaint, and on its face appears to have been executed at Pittsburg, Pa. The complaint was filed September 5, 1901, more than five years after the maturity of the note; but in explanation of the delay several acknowledgments of the indebtedness are alleged, of dates, respectively, October 14, 1897, June 15, 1898, November, 1899, May, 1901, and July, 1901. The allegation of the first acknowledgment is: "That on or about the 14th day of October, 1897, defendant acknowledged to plaintiff his (defendant's) said indebtedness upon the said promissory note in the words following, to-wit: 'This (referring to the said note) is a just debt. You have accommodated me and I will pay it.' " The allegations of the other acknowledgments are similar in form; and it is further alleged "that by each and all of his said words, promises, and acknowledgments, hereinbefore alleged, defendant meant and referred to, and acknowledged, and promised to pay to plaintiff, his (the said defendant's) indebtedness upon the said promissory note." The answer, referring to the several acknowledgments, denies, as to each, that defendant ever "acknowledged to plaintiff his indebtedness upon the promissory note set out in the plaintiff's complaint in the following words" and so on, as in the complaint. It denies, also, that "by any of the promises and acknowledgments claimed to have been made by the defendant, and set out in the plaintiff's complaint, he promised to pay any indebtedness upon said promissory note." Finally, subdivision 1, section 339, Code Civ. Proc., is pleaded in bar of the action.

The findings are: That plaintiff's cause of action is barred by the statute of limitations as alleged; "that (as to each of the alleged acknowledgments) it is not true that on (the day named), or at any other time, or at all, defendant acknowledged to plain-

tiff his indebtedness upon the promissory note set out in the plaintiff's complaint in the following words," etc., as in the complaint; and finally, "that it is not true that at any time, or at all, defendant ever made an acknowledgment or acknowledgments admitting his obligation to pay said note, or that he ever agreed or promised to pay the same." On the trial no evidence was offered by the plaintiff; and none by the defendant, except as to the effect that he was a resident of the state of Pennsylvania until the summer of 1897, and since then has been a resident of the city of Los Angeles. The position of the appellant is that the allegations of the complaint as to the several acknowledgments made by the defendant are not effectually denied, and hence that, upon the admitted facts, the case comes within the saving clause of section 360, Code Civ. Proc., or, failing this, that the provision in question is repugnant to section 8, article 1, of the federal constitution, relating to the regulation of commerce, and to section 2, art. 4, and the fourteenth amendment, relating to the rights of citizens of the United States in the several states.

The latter point may be disposed of by saying that we do not perceive how any of the constitutional provisions cited can be regarded as applicable to the case. The provision in question, or legislation of a substantially similar character, has existed in this state for more than half a century (Hittell's Gen. Laws, p. 636; St. 1852, p. 161, c. 84; St. 1855, p. 75, c. 66); and, though repeatedly before this court, the constitutionality of such legislation has never been questioned. *Patten v. Ray*, 4 Cal., 287; *Parke v. Williams*, 7 Cal., 247; *Scarborough v. Dugan*, 10 Cal., 305; *Palmer v. Schaw*, 16 Cal., 93; *Dorne v. Thornburgh*, 90 Cal., 66, 27 Pac., 30, 25 Am. St. Rep., 100; *Harrigan v. Home Life Ins. Co.*, 128 Cal., 543, 58 Pac., 180, 61 Pac., 99.

With regard to the former point, the position of the appellant is that the denials in the answer are pregnant with the admission, in each case, of an acknowledgment of the debt in some other words than those charged (Code Civ. Proc., § 437; *Pomeroy's Ed.*, p. 220 *et seq.*, and authorities cited), and hence that the allegations of the complaint are to be taken as substantially admitted. To this it is replied by the respondent that the complaint is to be construed as averring that the promises or acknowledgments alleged were made in writing, and hence that, under similar rules of pleadings, it was sufficient to deny the writings alleged.

Of the respondent's contentions, the first is clear; for otherwise, under section 360, Code Civ. Proc., the alleged acknowledgments would be immaterial. The facts alleged are therefore in effect simply that the defendant made or executed the several writings, or, we may say, written instruments described. Such being the case, the material fact alleged in each of the allegations was the making of the written promise or acknowledgment set up, and it was sufficient for the defendant to deny this, which he in effect did in denying that he ever made any of the acknowledgments in the words alleged: for, if these denials could be construed as admitting acknowledgments of the debt in other words, this would be simply an admission of writings other than those alleged, which, under familiar rules of practice, would be variance from the writings alleged, and therefore immaterial. 1 Chitty on Plead., 312, 318; 1 Green, on Ev., § 69 *ad fin.* This rule has always been applied with peculiar strictness to cases where—as here—the tenor of the writing, or in other words, its language, is pleaded; the words, in such cases, being regarded as “descriptive of the identity” of the writing alleged. 1 Starkie on Ev., 628; Reg. v. Drake, 2 Salk., 660; Clark v. Phillips, Hemp., 294, Fed. Cases, No. 2831a; 28 Am. & Eng. Encyc., p. 50 and note. And see, also, recitals in the statutes cited 2 Saunders Pl. & Ev., 1189 *et seq.*, title “Variance.”

The doctrine of variance has, indeed, been greatly mitigated in its application by the English statutes cited, and in this state by the provisions of the Code of Civil Procedure (sections 469-474); but the former operate only by providing for amendments, and the latter mainly in the same way, though also modifying the rules of evidence. Otherwise, the doctrine remains unaffected, and is, indeed, recognized and affirmed by the curative statutes themselves. The rule, therefore, is “the same under our system of practice as at common law,” except in so far as the consequences of a variance, may, under the statutes, be obviated at the trial. Stout v. Coffin, 28 Cal., 67. The case is therefore, the same as that of a suit on a promissory note; the complaint alleges that on a day named “the defendant executed his promissory note in the words and figures following,” etc. Here a simple denial of the execution of the alleged note would be sufficient (Code Civil Proc., §§ 447, 448); and a denial that on the day, named, or at any other time, the defendant “executed the promissory note set out in the complaint,” or “a promissory

note in the words and figures set out in the complaint," or, "in the words and figures following," etc., would be precisely equivalent.

We advise that the judgment and order appealed from be affirmed.

Judgment affirmed.

DIMON v. DUNN.

15 N. Y., 498. [1857.]

Appeal from a judgment of the Supreme Court. The action was commenced June 24, 1852, and was brought to foreclose a mortgage executed by the defendant Dunn to the plaintiff. The complaint stated the execution of a bond by Dunn to the plaintiff, dated July 8, 1845, in the penalty of \$500, upon condition that the same should be void if the defendant should pay to the plaintiff \$250, on the 8th day of July, 1855, with interest at 7 per cent, payable semi-annually, and that "it was thereby further agreed that if any default should be made in the payment of said interest or any part thereof, on any day whenever the same was made payable as above expressed, and should the same remain unpaid and in arrear for ten days, then, after the lapse of the said ten days, the aforesaid principal sum, with all arrearages of interest, should, at the option of the plaintiff, become and be due and be immediately payable thereafter." The complaint proceeds to state that, as collateral security for the payment of said indebtedness, the defendant Dunn, on the same day, executed to the plaintiff a mortgage on certain premises which are described, "with the same condition as the said bond," and that the mortgage was duly recorded July 16, 1845. It then states a default in the payment of half-a-year's interest on the mortgage debt, which fell due January 8th, 1852, and claims that the whole debt and interest has, in consequence thereof, become payable. Bridges and wife are made defendants as parties having some interest subsequent to the mortgage. Bridges answered, setting forth a conveyance with warranty, by Dunn to himself, of the mortgaged premises, dated 24th of September, 1850, "subject to a certain mortgage encumbering the same," executed by Dunn to the plaintiff, bearing date of July 8th, 1845, and

recorded, etc., stating the time and place of record, with the book and page. He avers that this is the only mortgage upon the premises, and that it is conditioned for the payment of \$250, lawful money, on the 8th day of July, 1855, and the interest thereon at 7 per cent, to be paid semi-annually, "and does not contain any condition, agreement, or clause that in case the interest or any part thereof, on any day whenever the same was made payable, should remain unpaid, and in arrears for ten days, the principal sum, all arrearages of interest should, at the option of the plaintiff, become, and be due and payable immediately thereafter;" that the defendant caused said deed to be recorded. The defendant avers the tender of the half-year's interest alleged to be in arrear, after ten days had lapsed and before the commencement of the action, which, it is stated, he brings into court. He denies that he had any notice or knowledge that the bond contained any such agreement as is set forth in the complaint, prior to the time when he made such tender. The answer concludes by a denial that the plaintiff has a right to claim that the whole debt had become payable.

The plaintiff demurred to the answer; but the Supreme Court held that it set forth a defense to the action, and gave judgment for the defendant, with leave to the plaintiff to reply; and ultimately, the plaintiff not availing himself of the liberty thus given, final judgment was perfected in favor of the defendant, which was affirmed at a general term, and the plaintiff appealed.

DENIO, C. J. The correct method for the defendant to have brought the question which he wishes to raise, before the court, was to set out the mortgage *verbatim*, and then to have stated the matter of avoidance, which, upon his construction of the mortgage would have barred the action; or he might have denied the execution of the alleged mortgage. Either of these methods would have raised the question of law arising upon the instrument; but an averment that a certain clause is not contained in the mortgage, without giving its actual language, does not afford sufficient data for determining its legal effect. Such an answer would have been insufficient under the former rules of pleading. But as those rules are abolished, we are perhaps obliged to pronounce upon these securities in the light of such averments respecting them as the parties have furnished us with.

The complaint sets out the bond, and as a portion of it, the clause by which the payment of the principal of the debt was

to be accelerated by a default in the interest; and it then states the execution of the mortgage on the same day "as collateral security for the payment of such indebtedness," and that it contained the same condition as the one in the bond. As the plaintiff was only bound to state the legal effect of his securities, leaving it to the defendant, if he questions the accuracy of the statement, to set them out or to deny the deeds, his pleading is not to be understood as averring that the mortgage contained a condition in the same language with that embraced in the bond. The complaint would be proved in substance if it should appear that the mortgage contained a reference to the bond in the usual form, "according to the condition of a certain bond, bearing even date with the mortgage." Such reference would be sufficient to make the mortgage payable upon the same conditions, in all respects, with the bond; and it might, then, properly be said that the mortgage was upon the same condition as the bond. A mortgage is always collateral to the debt attempted to be secured, and when it refers to the instrument which is the principal security, the two instruments are to be taken together, and form but one security. Now to say, as this answer does, that the mortgage does not contain any condition, agreement or clause, in the terms stated in the averment in the complaint where it sets out the conditions of the bond, does not meet the substance of the allegation that the mortgage has the same condition as the bond. It simply pleads the existence of certain language, without denying the substance of the contract as set out in the complaint, and without setting out the contract itself, so that the court may see what it is. It may well be that nothing is said, in terms, in the mortgage, as to the effect of the non-payment of interest; and yet it may refer to the bond in such a manner as to adopt its provisions. It is not stated, either in the complaint or the answer, that there was any covenant in the mortgage for the payment of the debt. Assuming that there is no such covenant, the bond is the only personal obligation. The object of the mortgage is to reinforce that obligation; and a reference in the mortgage to the paper containing such obligation, makes the bond a part of the mortgage for all essential purposes. The answer, to present a bar to a foreclosure should, at least, have shown that there was nothing on the face of the mortgage to connect it with the bond.

I conceive that the recording laws have nothing to do with

the case. The defendant purchased with a full knowledge of the plaintiff's mortgage, and subject to it. The existence or effect of constructive notice, arising out of the record, is immaterial to the case. The defendant, by his purchase, undertook to pay off the mortgage, according to its terms. If the mortgage referred to the bond, and the answer does not deny that it did, he had notice of that instrument and was bound to make himself acquainted with its provisions. I am of opinion that the answer is insufficient.

The judgment of the Supreme Court should therefore be reversed and judgment should be given for the plaintiff.

Judgment reversed.

FULLER v. MANHATTAN CONST. CO.

88 N. Y. S., 1049. [1904.]

SCOTT, J. The complaint alleges the incorporation of the plaintiff and defendant; that plaintiff was the lessee of a certain building; that on May 23, 1903, the plaintiff leased to the defendant two rooms in said building for a period of 11 months, ending May 1, 1904; that the rent for the months of November and December, 1903, and January, February, and March, 1904, became due and were demanded, but plaintiff has refused to pay the same. The answer denies on information and belief the incorporation of plaintiff; and that it was lessee of the building, and denies the allegations of paragraphs 7, 8, and 9, of the complaint, being the allegations respecting the rent for the months of January, February, and March, 1904. It then sets forth, as a separate defense, that the rent for November and December became due and was unpaid, and that the plaintiff harassed and annoyed the defendant by threats and intimidation, and that when, in March, 1904, defendant decided to leave said rooms plaintiff prevented it from removing its effects therefrom. For a third defense, and by way of counter-claim, the defendant reaffirms the allegations of its second defense, and demands damages therefor. The plaintiff demurred to the whole answer as insufficient in law upon the face thereof, and separately

demurred to the counter-claim as not stating facts sufficient to constitute a cause of action. The demurrer was overruled.

The whole theory of the defense and counter-claim is based upon the erroneous apprehension that the covenant of quiet enjoyment in a lease is broken, simply because the landlord in some way annoys the tenant in the possession and enjoyment of the demised premises. Such is not the law. To constitute a breach of the covenant, there must be an actual or constructive eviction, and there cannot be deemed to have been a constructive eviction without a surrender of the premises. And to constitute a defense to an action for rent, the eviction must take place before the rent becomes due. *Gugel v. Isaacs*, 21 App. Div., 504, 48 N. Y. Supp., 594. In the present case the defendant did not attempt to leave before March 15th, and the rent for March, by the terms of the lease, became due on the first of the month. So, even if the defendant should claim that the acts of the landlord amounted to a constructive eviction, and that they were about to surrender possession in consequence thereof on March 15, these facts, if sustained, would be no defense to an action for the March rent. The facts stated in the second defense do not, therefore, constitute a sufficient defense to the action for rent. Nor are they sufficient to sustain a counter-claim. The acts of the landlord, if established, are not a violation of the contract of leasing, but amount to a tort, if anything, and damages therefor may not be counter-claimed in an action upon a contract of lease. It is clear, therefore, that the facts alleged in the second defense are insufficient, and that the demurrer to the counter-claim should have been sustained.

The demurrer for insufficiency, being to the whole answer, was properly overruled if there is an issue raised by any of the denials or allegations. The defendant relies upon its denials. These are three in number, but unless they are denials of material allegations of the complaint, or serve to put in issue some fact alleged in the complaint which the plaintiff must prove in order to recover, and which the defendant may disprove, they raise no issue, and are unavailing. The denial, on information and belief of plaintiff's incorporation, raises no issue. The like denial that the plaintiff is the lessee of the building in which defendant rented offices, likewise raises no issue, because the tenant cannot question his landlord's title to the demised premises.

The denial of the allegations respecting the nonpayment of the rent for January, February, and March also raises no issue, when taken in conjunction with the circumstances that the lease is admitted by a lack of denial. That the rent became due and payable is a conclusion of law, and not of fact, and is not put in issue by the denial. Whether it was demanded or not is immaterial, and the denial of a demand is not, therefore, the denial of a material fact. The general denial of all allegations, including the allegation of nonpayment, is not sufficient to permit proof of payment, which must be pleaded in order to be proved. It follows that none of the denials are sufficient to relieve the answer of the charge of insufficiency.

Judgment reversed, and demurrer sustained, with costs in this court and the court below, with leave to defendant to amend its answer within 20 days upon payment of costs.

MARSHALL v. THE THAMES FIRE INS. CO.

43 Mo., 586. [1869.]

WAGNER, Judge, delivered the opinion of the court.

Notwithstanding the voluminous record in this case, the real matter in controversy may be compressed within a very small compass. The issues framed by the parties made the result turn purely on questions of fact, and if there was no misdirection by the court, or error in its rulings, the finding of the jury cannot be disturbed. The petition alleged that by the policy of insurance, the boat was valued at one hundred and sixty thousand dollars, and that at the time of its loss or destruction by fire, it was of the value of one hundred and twenty-five thousand dollars, and more than all insurance thereon. The defendant, in its answer, did not controvert this allegation, but averred as matter of defense, that the burning of the said steamboat *Magnolia*, the boat described in the petition, was occasioned, caused, and brought about by the direct agency, procurement, contrivance, and direction of Marshall and Kilpatrick, the plaintiffs. The whole defense was distinctly staked upon that issue, giving the defend-

ant the affirmative; and all material allegations in the petition, which were well pleaded, stood admitted. The question of pleading is of essential importance in view of the instruction of the court, which will presently be adverted to. It may not be easy to define on all occasions, what are material averments in a petition. An immaterial averment need not be denied, but a material one must be, else it will be taken as confessed. The practice act requires that the plaintiff shall make in his petition a plain and concise statement of the facts constituting his cause of action; and when issue is intended to be joined upon these facts, the answer of the defendant must contain a special denial of each material allegation. Under the common law system of pleading, if the joinder was on an immaterial issue, the court would award a repleader.

The allegation that the boat was worth one hundred and twenty-five thousand dollars was immaterial, and required no denial. But is the same true of the further averment that she was worth "more than all the insurance thereon." The statement was of consequence, because there was other insurance on the boat besides the policy of the defendant, and it became necessary to show the relation which the value of the boat bore to the amount of insurance. For if the amount of insurance was greater than the value, the plaintiffs could only recover in the proportion that the value bore to the boat. The instruction complained of told the jury "that it stands admitted by the pleadings in the case that the value of the steamboat *Magnolia*, at the time of the fire which destroyed her, was greater than the whole amount for which she was insured."

I have no doubt about the correctness of the instruction. The allegation was, in substance, that the boat was worth more than the whole amount for which she was insured; and had here been a denial interposed—if the plaintiffs had not proved the truth of the statement, or it had been proved to be untrue—no recovery could have followed, except for the proportional part which they might have shown themselves entitled to. * * *

Judgment affirmed.

HARDEN v. ATCHISON & NEBRASKA R. R. CO.

4 Neb., 521. [1876.]

MAXWELL, J. The plaintiff filed his petition in the district court of Richardson county, alleging that on the twenty-first day of July, 1873, a mare belonging to plaintiff, was on the railroad track of the defendant, in Falls City precinct, Richardson county, when a certain train of cars belonging to the defendant, and managed and controlled by its agent and employes, was passing over the railroad track. That the said agents and employes of said railroad, negligently, carelessly, and wantonly, ran its engine and train of cars upon, over and against said mare, breaking one of her legs and causing other injuries, to the damage of the plaintiff in the sum of \$75.00," etc. It was also alleged in the petition that the railroad was not fenced, and that it had been constructed more than six months, at the time the injury was committed.

The defendant answered the petition of the plaintiff as follows: "The defendant, answering the petition of said plaintiff heretofore filed against it in the above entitled cause, says and denies that it negligently, carelessly, and wantonly ran its engine or locomotive and train of cars over or against the said mare of the said plaintiff. Defendant denies that the notice required by the statute, in such cases made and provided, was given it by said plaintiff, as to entitle said plaintiff to double damages. Defendant denies that the said mare was worth the sum of seventy-five dollars. Defendant alleges that the said mare of said plaintiff was injured in the manner alleged by said plaintiff's petition by and through the negligence and carelessness of said plaintiff."

On trial of the cause, the court instructed the jury as follows: "This suit is brought by the plaintiff to recover damages of defendant, alleged to be sustained by plaintiff, by reason of the defendant negligently, carelessly, and wantonly, running its engine upon and so badly injuring his mare as to render it worthless. The defendant denies that its engine or locomotive and train of cars ran over or against the mare of the plaintiff. This denial, puts the plaintiff upon proof of his cause of action; has he proved the injury was done by the defendant, or any of its employes? I must instruct you as a matter of law, that the plaintiff has failed to prove that the defendant committed the

injury, and your verdict must be for the defendant." To this instruction the plaintiff excepted. The jury found a verdict for the defendant. The plaintiff filed a motion for a new trial, which was overruled, and judgment was rendered dismissing the case. The case is brought into this court by petition in error.

Sec. 134, of the code of civil procedure, provides, that "every material allegation of the petition, not controverted by the answer, and every material allegation of new matter in the answer, not controverted by the reply, shall for the purposes of the action be taken as true."

Without considering the admissions contained in the answer, is there any denial therein, that the injury complained of was committed by the defendant? We think not. It is denied that the "defendant negligently, carelessly, and wantonly ran its engine or locomotive and train of cars over, or against the said mare of the said plaintiff," but this is a mere denial of negligence on the part of the defendant, and not a denial that the defendant occasioned the injury complained of. "A defendant must answer the charge directly, without evasion, and not by way of negative pregnant." 1 Vansantvoords, Eq., 204. Moaks Van Sant, Pl., 814. Baker v. Bailey, 16 Barb., 56; Fish v. Redington, 31 Cal., 194; Robbins v. Lincoln, 12 Wis., 8. A denial must be direct and unambiguous, and must answer the substance of each direct charge; and such facts as are not denied by the answer for the purposes of the action, are to be taken as true. This requirement of the statute is not designed to prevent the defendant from denying such facts in the petition, as he believes to be untrue, but to prevent the introduction of fictitious issues; and while denials must be positive and direct, the verification need only be, that the defendant believes the facts stated in the answer to be true.

There being no denial in the answer that the defendant committed the injuries complained of, no proof of those facts was required. The court therefore erred in instructing the jury to find for the defendant. The judgment of the district court is reversed and the case remanded for further proceedings.

Reversed and remanded.

HANSON v. LEHMAN.

18 Neb., 564. [1886.]

REESE, J. Plaintiff seeks the specific performance of contract for the sale of certain real estate, executed by the defendant to her. The contract, an ordinary bond for a deed, is set out in the petition. The recital is that plaintiff has agreed to purchase the property described, "as follows: Twenty-five dollars, with interest from date at the rate of ten per cent per annum, the above amount and interest to be paid on or before the first day of April, 1882." No other reference is made to the time of payment, nor to the performance or failure to perform the contract on the part of plaintiff. The contract was signed by the defendants. The petition alleges that the time for payment was extended by defendant for a year or longer, if desired by the plaintiff, and that, shortly after the expiration of the year, she tendered the money due and demanded a deed, which was refused. The answer admits the making of the contract, but denies that he did, "on or about the first day of April, 1882, grant an extension of time for the payment of the \$25, and interest thereon required by the terms of the agreement;" and denies that plaintiff "has performed, or offered to perform, the conditions on her part of the contract to be done or performed." The answer further alleges that it was the duty of plaintiff to pay the taxes on the premises, but she failed to do so, and that he has paid them; but fails to give the amount paid by him, and fails to ask any relief in that behalf. It is also alleged that, at the time of the sale, it was agreed that plaintiff should erect a building on the real estate in question, to be used for the purposes of a laundry, and that the same was to have been constructed prior to the execution of the deed; but that plaintiff has failed to construct the building, and that thereby defendant is discharged from the contract. To this answer a demurrer was interposed by plaintiff upon the ground that the answer did not state facts sufficient to constitute a defense. The demurrer was sustained. Defendant appeals.

Does the answer state a defense? It can not be claimed that, by the terms of the contract, the time of payment is made an essential ingredient. Therefore, it is doubtful if the allegation of the waiver or extension as alleged in the petition was a nec-

essary allegation. But assuming that it was, the denial is insufficient. The answer does not deny the extension, but denies granting it at the time alleged. In this the answer is ambiguous, and not sufficient. *Harden v. Atchinson & N. R. Co.*, 4 Neb., 521; *Maxw. Pl. & Pr.* (4th Ed.), 126. The same is true of the denial of the performance of the contract on the part of the plaintiff. None of the allegations of the petition are denied, but rather the conclusion to be drawn from them.

As to the payment of taxes. It is apparent that nothing was claimed, or the facts would have been stated; and as the amounts paid, if any, were not alleged, no defense could be based thereon.

The last defense pleaded is that it was agreed that plaintiff should erect a building on the premises. There is nothing alleged which would tend to show that it was a matter of any importance to defendant whether plaintiff built a house on the premises or not. The facts alleged constitute no defense.

The ruling of the district court in sustaining the demurrer was right, and is therefore

Affirmed.

JOINT SCHOOL DISTRICT v. LYFORD.

27 Wis., 506. [1871.]

LYON, J. The plaintiff, suing by the name of "Joint School District No. One, comprising the city of Prescott, and parts of the towns of Oak Grove and Clifton," brought this action on a bond in the sum of five thousand and six hundred dollars, executed by the defendants, or purporting to be executed by them, to "Joint School District No. One of the city of Prescott, and the towns of Oak Grove and Clifton," conditioned for the faithful discharge, by the defendant Beardsley, of the duties of his office as treasurer of such district. A copy of the bond is set forth in the complaint, and it seems to be in proper form. The breach assigned is, that Beardsley was afterwards removed from such office pursuant to law, by the county judge of Pierce county, in which county the district is alleged to be situated; and that, when so removed, he had in his hands \$877.97 of moneys belong-

ing to the district, which money he has neglected and refused to pay over to his successor in office.

The defendant Lyford demurred to the complaint, stating the following grounds of objection thereto: "First, that the plaintiff had not legal capacity to sue; second, that there is a defect of parties plaintiff; third, that there is a defect of parties defendant; fourth, that the complaint does not state facts sufficient to constitute a cause of action."

The circuit court overruled the demurrer, and the defendant Lyford then, by leave of the court, answered as follows: "1st. That the above named plaintiff is not a corporation doing business under the laws of the state of Wisconsin, and there is no such corporation. 2d. And for a further answer the said defendant denies that he did, on the 4th day of September, 1866, or at any other time, make, execute and deliver to the said plaintiff his bond or obligation, or become surety to the said plaintiff for the payment of any sum of money whatever."

Upon the issue thus made, the action was tried, and resulted in a judgment against the defendant Lyford, from which he has appealed to this court. The defendant Beardsley made no appearance in the action, and before trial he deceased, and his death was duly suggested in the record. * * *

3. It is objected that there is not sufficient evidence of the execution of the bond by Lyford. I think that its execution by him was not denied, so as to put the plaintiff upon proof thereof. His answer does not in terms deny the execution of *the bond*, a copy of which was set out in the complaint. He denies in the answer that he at any time made, executed, or delivered *to the plaintiff* his bond or obligation, or became surety *to said plaintiff* for the payment of any sum of money whatever. On his theory of the case, which was that the bond does not run to the plaintiff, he might make that denial, and at the same time have executed the bond in suit. It seems to me that the statute requires a positive denial of the signing or execution of the particular instrument, before the plaintiff can be put upon proof of its execution. R. S. ch. 137, Sec. 92. * * *

Judgment affirmed.

HARRIS v. SHONTZ. ✓

1 Mont., 212. [1870.]

SYMES, J. This was an action for damages for the diversion of water, and asking for a decree of title and perpetual injunction. Plaintiff alleged that he was the owner of certain mining ground and a water ditch, which conveyed two hundred inches of water to the same; that he had a prior right to the water; that defendants wrongfully diverted the said water to plaintiff's damage \$500; that defendants threatened to continue the diversion, which would cause great and irreparable injury to plaintiff, and were unable to respond in damages.

Defendants answered and denied the ownership of the ditch, and prior rights to the use of the water; denied that plaintiff had sustained damages in any sum; denied that diversion would cause irreparable injury. Further answered and set up title in the water by right of appropriation and agreement of defendants.

The case was tried at the November term, 1869, and the following verdict found for the plaintiff, viz: "We, the jurors, do find the plaintiff entitled to one-hundred and fifty inches of water in Washington gulch." The court on this verdict rendered judgment for costs against the defendants, and decreed the title to one-hundred and fifty inches of water in the plaintiff, and perpetually enjoined the defendants from interfering therewith.

The defendant excepted to the entry of judgment and decree on the verdict, moved for a new trial, which motion was overruled, and appealed to this court.

Does the verdict or finding of the jury in this case support the judgment and decree? The jury find for the plaintiff upon the material issue of title to the water. There is no denial that the defendants did divert, continue to divert, and threatened to continue to divert the water. The paragraph of the answer purporting to deny the diversion is as follows, *to-wit*: "Denies that the said defendants and their servants and employees did on said 1st day of April, 1869, and ever since said date, have continued *wrongfully*, and *illegally*, to divert the water of said Washington creek by means of a certain ditch owned and possessed by defend-

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ants.” Denying that they diverted it wrongfully and illegally is pregnant with the admission that they did in fact commit the act of diversion. The allegations of irreparable injury and insolvency were not necessary to be found by the jury. The plaintiff set up a title to the water, and asks that title be decreed to him; and alleged that defendants diverted, and threatened to divert the same. The trespass complained of, the diversion of the water, the continuing and threatened continuance thereof, not being denied, the admissions in the pleadings and the findings of the jury will support the judgment and decree. The title to the water being found in the plaintiff, and the defendant’s admission that they threatened to continue to divert it, entitled the plaintiff to a decree of title and injunction.

The defendants objected to the judgment for costs being entered because the plaintiff did not recover \$50 or more damages. The gist of the action appears to be the title, or prior right to the use of the water; the diversion is admitted by the defendants, but they deny the title to the water; upon this issue alone the cause was tried, and the plaintiff’s recovery of the water entitles him to costs.

Order of the court overruling motion for new trial is affirmed.
Exceptions overruled.

ROBBINS v. LINCOLN.

12 Wis., 1. [1860.]

The complaint of Lincoln, the plaintiff below, alleged that the defendant, Robbins, was indebted to him for money laid out and expended by him, and for work done and performed by him and his wife, for the defendant, at his request, and for a promissory note executed by one Francis Massing, payable to the plaintiff, and by him sold and delivered, to the defendant, at his request, the several items of which indebtedness were as follows:

(Here follow various items of cash alleged to have been paid out by the plaintiff for the defendant, amounting to \$2,204.49, and also the following:)

1858, Nov. 18, To Massing's note sold you.....	\$676.08
Interest on same.....	10.00
1859, Jan. 1, To one year's work of self.....	400.00
2 months' work of plaintiff's wife.....	16.00

The complaint further stated that the sum of \$2,825.95 of the said indebtedness had been paid, and that there was due from the defendant to the plaintiff the sum of \$480.62, with interest, for which the plaintiff demanded judgment.

The answer of the defendant denied that the plaintiff had laid out or expended any money for him, except such sums as had been delivered by him to the plaintiff for that purpose, and denied that he was indebted to the plaintiff in any sum therefor. The defendant also denied that he was indebted to the plaintiff for one year's services, performed by him as stated in the complaint, but, on the contrary, alleged, that during a portion of the time when said services were performed, to-wit, from January, 1858, to the 6th of July, 1858, the plaintiff was in the employment of the firm of "Tweed & Robbins" (composed of John P. Tweed and the defendant), and not of the defendant individually; that the plaintiff was never in the employment of the defendant, individually except for about six months, commencing on the 6th of July, 1858, and during that time was, by agreement, to be paid at the rate of \$300 per year; that the defendant was not indebted for the services of the plaintiff's wife, but that the same had been paid for by her board at the house of the defendant; that the defendant had no knowledge or information, sufficient to form a belief, whether the plaintiff had laid out and expended all the sums of money delivered by the defendant to him for that purpose as aforesaid, and, therefore, had no knowledge or information sufficient to form a belief, whether he was upon a final accounting, indebted to the plaintiff in any sum whatever.

Here it was impossible to tell whether self was tending deny.

By the Court, PAINE, J. * * * The allegation in the complaint, of the sale to the defendant of Massing's note, is not denied at all. The rendition of the services by the plaintiff's wife is not denied, but the answer avers that they were paid for in a particular manner, and to establish that, the burden of proof was on the defendant. It is evident, therefore, that the answer, so far, put in issue only the question whether the plaintiff was to have \$400 or \$300 per year for his services; whether for half the time he worked for Tweed & Robbins; and whether

the wife's services had been paid for. Do the remaining allegations give it a different effect? They relate to the sums averred in the complaint to have been paid out by the plaintiff for the use of the defendant. The first part of the answer denies that the plaintiff had laid out or expended any money for the defendant at his request, "except such sums as had been delivered by him to the plaintiff, while the plaintiff was in his employ, for that purpose." This is clearly no denial that the plaintiff paid out the money, but on the contrary impliedly admits it. It avoids the liability, by averring that the money paid out had been in fact furnished by the defendant for that purpose, and is like the answer in *Hamilton v. Hough*, 13 How. Pr. R. 14, where the answer denied that the plaintiff had sold the defendants any goods that had not been paid for, which the court held not to amount to a denial.

The latter part of the denial avers that the defendant had no knowledge or information sufficient to form a belief, whether the plaintiff "had laid out and expended all the sums of money delivered by the defendant to the plaintiff for that purpose as aforesaid, and, *therefore*, had no knowledge or information sufficient to form a belief whether he was, or on a final accounting with the plaintiff would be, indebted to the plaintiff in any sum whatever." The latter part of this clause relates only to the legal conclusion of indebtedness, and if it contained a positive denial of indebtedness without denying the facts alleged, out of which the indebtedness would arise, it would amount to nothing. *Drake v. Cockroft*, 10 How. Pr. R. 377. Its effect depends, therefore, on the first clause, and it is very evident that if this referred expressly to the allegations of the complaint, it would be objectionable in point of form. The complaint avers that the plaintiff paid out for the defendant divers sums of money, giving a great number of items. Suppose the answer should contain a specific denial that *all* those sums were paid out. Such a denial is not inconsistent with a perfect knowledge that all but one had been paid out. A denial in the precise language of the complaint is not sufficient; it must be of the substance of the allegation. And the rule as to answers in equity has been held applicable to answers under the Code. And under that rule, "it is not enough when a charge is made with all the circumstances of time and place, etc., to deny such charge generally in the words thereof, but in all cases where the charge

embraces several particulars, *the answer should be in the disjunctive, denying each particular, or admitting some and denying others according to the fact.*" Van Santvoord Pl., 426. It seems very obvious that to a complaint for goods sold and delivered, a denial that the plaintiff has sold and delivered *all* the goods mentioned, would be insufficient. But the denial in this answer does not even amount to that. As before observed, the first part of it is simply a denial that the plaintiff had paid out any moneys, except such as the defendant had furnished him for the purpose. This implies that he had furnished the plaintiff moneys to be paid out, but contains no averment as to how much. The last part of the answer is a denial of knowledge or information sufficient to form a belief, not as to whether the plaintiff had paid out all the moneys averred in the complaint, but all which the "defendant had furnished as aforesaid." He might have furnished more than the complaint claimed to have been paid out, and then the answer would have been consistent with a perfect knowledge that the plaintiff had paid all he alleged. It seems clear, therefore, that an answer averring, by inference, that the defendant had furnished the plaintiff money to pay out, and then denying knowledge or information as to whether he had paid it all out, cannot be construed into a denial of knowledge that the plaintiff had paid out certain sums mentioned in the complaint. I think, therefore, that, as a matter of strict pleading, the allegations in the complaint as to the paying out of money were not sufficiently denied to put the plaintiff upon proofs. * * *

Judgment affirmed.

WEST v. THE AMERICAN EXCHANGE BANK.

44 Barb. (N. Y.) 175. [1865.]

Appeal from a judgment entered at the circuit on a trial before the court without a jury. The complaint alleged that the plaintiff, on the 29th day of May, 1861, was the owner of a certain promissory note; that on that day, he employed the defendant to collect the same; and that the defendant did collect it, but had failed to pay over the proceeds, although often

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requested to do so. The answer denied none of these allegations, but set up new matter, viz.: that the defendant was collecting agent in the city of New York for the Medina Bank, and as such received and held the note in question until its maturity, when the proceeds were received by it as such agent. And that afterwards, and before the 1st of July, 1861, it paid the same to the said Medina Bank.

The court found the following facts: That on the 29th day of May, 1861, the plaintiff was the owner of a note made by one West, and payable in the city of New York, for \$535, to mature on the 1st and 4th of June. That on the first day named, he deposited the note for collection, in the Medina Bank, Orleans county, indorsed in blank. That, at this time, the Medina Bank was indebted to the defendant, for over drafts, to an amount largely exceeding the amount of said note. That on the day named and being so indebted, the Medina Bank forwarded the note to the defendant, with directions, "To collect said note, and credit said Medina Bank with the proceeds." That on the 4th day of June the note was collected, and the proceeds credited in the books of the American Exchange Bank to the account of the Medina Bank, which account then showed the indebtedness of the latter bank to the defendant to be \$3,273.37. That the Medina Bank failed and suspended business, on the evening of the 4th of June, 1861, and on the 7th, the defendant was notified of said failure. That after the 29th day of May, the defendant continued to pay the drafts of the Medina Bank. That the defendant, at the time of receiving the note, from the Medina Bank, and until the time of collecting and crediting the proceeds thereof, as above stated, had no notice or knowledge that the note belonged to the plaintiff, or that the same was not the property of the Medina Bank, and the proceeds thereof were credited by the defendant to the Medina Bank in good faith, in the ordinary course of business between them. That prior to the said 29th day of May, 1861, it had been agreed between the president of the Medina Bank and the defendant that all paper sent for collection by said Medina Bank should be held by the defendant as collateral security for any balance of account owing by the latter to the defendant. That on or about the 1st day of March, 1863, the plaintiff demanded the proceeds of said note, of the defendant, and the latter refused to pay the same to him.

And the Judge found as a conclusion of law, that the defendant was not indebted to the plaintiff for the proceeds of said note, and that he was entitled to judgment dismissing the complaint with costs. From this judgment the plaintiff appealed.

By the Court, JAMES C. SMITH, J. Upon the facts found by the court at a special term, the defendants cannot be regarded as purchasers or holders *for value*, of the note described in the complaint, or of its proceeds, according to the rule prevailing in this state, so as to exclude the claims of the plaintiff, who is the real owner. * * * The defendants also contend that the plaintiff cannot maintain this action, for the reason that their bank was the agent of the Medina Bank in respect to the collection of the note, and owed no duty to the plaintiff. But the pleadings admit the reverse of this to be the fact. The complaint expressly alleges that "the plaintiff employed the defendant to collect the note; which the defendant undertook to do"; and this allegation is not denied by the answer. The most that can be claimed by the defendants is that the answer contains a version of the transaction which is in some respects inconsistent with the allegation in the complaint; but that does not amount to a denial. (Wood v. Whiting, 21 Barb. 190). It has been said that an allegation which, if uncontroverted, is to be taken as true, should be direct and positive; one which at most merely implies a fact or justifies an inference that such is or will be claimed to be the fact should not be construed as a material allegation. (Per Bosworth, J. Oechs v. Cook, 3 Duer, 161). The correctness of these observations when applied to an affirmative allegation, or an allegation of new matter, can not be questioned. The like remarks are equally applicable to an allegation in an answer by which it is attempted to deny a material allegation in a complaint, or, in other words, "to join issue." A denial may be general or specific, at the option of the pleader, but in either case it must be direct and unequivocal. If it merely *implies* that the allegation is controverted, or justifies an *inference* that such is, or will be claimed to be its effect, it will not be construed as a denial. Tested by this rule, the answer before us does not deny the allegation referred to, contained in the complaint, and that allegation being uncontroverted is to be taken as true, for the purpose of the action. This being the requirement of the statute, (Code, § 168), the fact thus admitted by the pleadings can not be contradicted or varied by evidence;

and as the judgment of the court below is contrary to such fact, it is erroneous.

The judgment will be reversed, and a new trial ordered, with costs to abide the event.

Ordered accordingly.

LEFFINGWELL v. GRIFFING.

31 Cal. 232. [1866.]

Plaintiff recovered judgment in the court below, and defendant appealed from the judgment and from an order denying a new trial.

The other facts are stated in the opinion of the Court.

By the Court, SHAFER, J. The complaint is in two counts. The first count alleges that the defendant promised the plaintiff if he would find a purchaser for certain real estate in San Francisco, that the defendant would pay the plaintiff for his services the excess of the purchase money over and above the sum of sixty-two thousand dollars; that the plaintiff procured F. H. Waterman to buy at sixty-five thousand dollars, which sum the defendant had actually received.

The second count is for three thousand dollars, as so much money had and received by the defendant to the plaintiff's use. No allusion is made to Waterman or the purchase money paid by him, or to the sixty-five thousand dollars, or to any feature of the special contract. The count is, in short, for money had and received, in the most general form. No bill of particulars was asked for, nor was any filed.

Issue was well taken on the first count, but to the second count, there was no response. The only passage in the answer that can be claimed to have any reference to that count is this: "He denies that he received three thousand dollars in gold coin, parcel of the sixty-five thousand dollars, to and for the use of the plaintiff." This denial is bad for two reasons: First, The count does not charge that the three thousand dollars sued for was parcel of the sixty-five thousand dollars, or of any other sum, but three thousand dollars, absolutely and without clog. The traverse is, therefore, pregnant with an admission that

three thousand dollars had been received as charged—that is, three thousand dollars disconnected from the circumstances named in the denial, and spoiling its pith. Second, the traverse is vitiated for another but kindred reason. The denial is that the three thousand dollars was received in gold coin. That involves an admission that three thousand dollars was received in either one of the two other forms of lawful money, and therein it denies what was non-essential and admits all that was essential to a recovery.

Judgment affirmed.

LOEB v. WEIS.

64 Ind. 285. [1878.]

PERKINS, J. John M. Weis & Co. were a mercantile firm, largely indebted. Said firm sold and transferred to Elias Weis their entire stock of goods, notes, and accounts; and, in consideration of such sale and delivery, said Elias Weis promised the said John M. Weis & Co., by their firm name, to pay to the creditors of said firm all claims and demands existing against it.

Said Weis & Co. owed Loeb et al, the appellants, the sum of three hundred and thirty-seven dollars and eighty-five cents, which they demanded of Elias Weis, and which he failed to pay, etc.

This suit is by said appellants, against said appellee, on his promise to Weis & Co. to pay their creditors. The complaint states a cause of action. *Miller v. Billingsly*, 41 Ind. 489, and cases cited; *Haggerty v. Johnston*, 48 Ind. 41; See *Crim v. Fitch*, 53 Ind. 214.

Answer in three paragraphs: 1. General denial; 2. Payment by Weis & Co., the original debtors; and, 3. "That the goods, notes, and accounts, etc., alleged in the complaint to have been sold by said John M. Weis & Co. to defendant, were transferred and delivered to him to be disposed of as follows, to-wit: for the purpose of being appropriated by defendant to the payment, so far as they might go, of the debts which had been contracted by a prior firm, composed of said John M. Weis and Horace Case, one William R. Kennedy having succeeded to the rights and liabilities of said Case, as a member of the

firm of John M. Weis & Co., and defendant having become bound in the sum of one thousand dollars to save said Case harmless, and for the further purpose of satisfying two notes held by defendant upon the firm of John M. Weis & Co., amounting to the sum of five hundred dollars, which said goods and merchandise, notes, etc., amounting nominally to about twenty-one hundred dollars, were to be converted into money by defendant as expeditiously as practicable and in such manner as he might deem proper, and the proceeds applied, first, in satisfaction of the debts so contracted by the said Weis & Case; secondly, to the satisfaction of said notes so held by him upon said Weis & Kennedy, as hereinbefore stated; and, thirdly, to the satisfaction of the indebtedness of said firm of John M. Weis & Co., so far as the surplus would go; and defendant avers, that he sold said goods, etc., by retail, and at auction, with the knowledge and consent of the said John M. Weis & Co., and that he collected said notes and accounts, so far as the same could be collected, and that he applied the proceeds of such collections to the payment of the debts of said Weis & Case, which amounted to the sum of sixteen hundred dollars. Defendant further says, that the amount of the notes and accounts uncollectible, as aforesaid, is four hundred and eighty-two dollars; that he has already paid upon the indebtedness, against which said Case was indemnified by him, as aforesaid, seven hundred and fifty dollars more than the amount realized by him from the sales and collections aforesaid, leaving the two notes held by him, as aforesaid, wholly unsatisfied." Wherefore, etc.

Demurrer to the third paragraph of answer for want of facts overruled, and exceptions entered.

We briefly notice the question presented.

The court did not err in overruling the demurrer to the third paragraph of answer. The suit was upon an alleged promise to do a certain thing. On proof of substantially such a promise, the plaintiff's right of recovery depended.

The third paragraph of the answer averred that the promise, on the occasion alleged in the complaint, was entirely different in its terms from what the complaint alleged it to be, setting out those terms. This was an argumentative denial of the promise alleged in the complaint. The matter alleged could have been given in evidence, under the general denial. Still the paragraph of the answer contained facts constituting a defence

to the action; and, while the party might have been permitted to give them in evidence under the general denial, which was pleaded, yet he had a right to plead the facts specially, and, having done so, it was not error in the court below to overrule a demurrer to such special paragraph. Such is the settled law of this State.

What is said by Judge Howk, in *Morris v. Thomas*, 57 Ind. 316, is not in conflict with our decision on this point. He says in that case, that, "An argumentative denial is seldom 'good,' in pleading, for any purpose"; but the case does not decide that an argumentative denial may not, in any case, contain facts constituting a defence to an action. * * *

The judgment is affirmed, with costs.

for def.

PHILLIPS v. HAGART.

113 Cal. 552. [1896.]

GAROUTTE, J. This action involves the right of possession to a certain tract of land, and the complaint is in the usual and ordinary form for such cases. The appeal presents but few questions for the court's consideration.

One Morrison was the owner of the land. While such owner, a mortgage resting upon it was foreclosed, and the defendant, Hagart, became the purchaser at the sale under the foreclosure proceedings. Thereafter, and within the time allowed for redemption, Morrison transferred the property by deed to these plaintiffs, who at once took steps to redeem from the sheriff's sale. Notwithstanding the acts of plaintiffs in attempting to redeem, the sheriff refused to issue a certificate of redemption, and, in due course, gave a deed of the property to the defendant, as a purchaser at the sale. Defendant relies upon this deed for title, while plaintiff asserts title by reason of their deed from Morrison, coupled with the claim that the acts performed by them looking towards a redemption were sufficient in law to accomplish that result.

As already suggested, the complaint was in the simple and ordinary form as for an action in ejectment. Defendant, by answer, denied the allegations of the complaint, and set out his

title in detail, consisting of the sheriff's deed and the proceedings upon which it was based. Plaintiffs answered defendant's pleading by denials. It is now claimed by defendant that the affirmative matters set out in his answer constituted a cross complaint, and that certain allegations thereof must be deemed to be true by reason of insufficient denials thereto. Upon the insufficiency of these denials, we will not dwell, for the contention seems to be immaterial. The affirmative matters set out by defendant in no sense constituted a cross complaint, and no denial of them was necessary. A recital by defendant of his title was no more than a denial of plaintiff's title, and opened the door no wider for the admission of evidence. Whatever defendant was entitled to prove under his pleading as he framed it, he was entitled to prove under a general denial. An allegation of title in himself, in an action of ejectment, by defendant, is but a general denial in an argumentative form. *Marshall v. Shafter*, 32 Cal. 192. See *Cooper v. Miller*, (Cal.) 45 Pac. 325.

* * *

Judgment affirmed.

for plain.

LEWIS v. COULTER.

10 Ohio St. 452. [1859.]

The plaintiff in error, defendant below, filed an answer to the petition of the plaintiff below, in these words:

"The said defendant denies all the material allegations of said plaintiff in his said petition."

To this, the plaintiff below, demurred, and assigned for cause that the same did not state facts sufficient to constitute a defence to the action. The court below sustained the demurrer, and the defendant excepted, but thereupon took leave to file an amended answer, which he did, and in which he made his denials more specific and certain. On the issue thus joined there was a trial, and the plaintiff below had a verdict and judgment.

The ruling of the court sustaining the demurrer to the first answer, is assigned for error.

By the Court. 1. The court below erred in sustaining the

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demurrer. The answer, liberally construed, as required by the code (sec. 2), was good on demurrer. But,

2. The defendant below, having filed an amended answer, and had, under that, all the benefits he could have derived from the first answer, the error is not such as requires a reversal of the judgment.

3. The first answer, though good on demurrer, was not sufficiently certain and specific; and, had a motion been made for that purpose, the defendant below might have been properly required to make the same more certain and specific. A pleader ought not to be permitted, by the use of the qualifying word "material," to assume to himself the determination of the questions as to what facts are material, and thus render a conviction for perjury, on a willfully false verification, difficult or impossible. And where the denial is general, it should be not simply of "all," but "of each and all," or "each and every" of the allegations referred to.

Judgment affirmed.

KINGSLEY v. GILMAN.

12 Minn. 515. [1867.]

McMILLAN, J. This is an appeal from an order of the district court striking out a portion of the defendant's answer. The portion of the answer stricken out is as follows: "The said defendant denies each and every statement and averment, and every part of the same, in said amended complaint contained, as therein stated or otherwise, save as herinafter stated, admitted, or qualified." The grounds of the motion to strike out this portion of the answer were as follows: That, "the same is so indefinite and uncertain that the precise nature of the defence is not apparent, and that the same does not contain a denial of each nor of any allegation in the complaint, nor of any knowledge or information thereof sufficient to form a belief."

The respondent interposes the objection that this is not an order involving the merits of the action, or some part thereof, but merely a question of practice resting in the discretion of the court, and is not appealable.

This portion of the answer purports to be a denial of all the

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allegations in the complaint not expressly admitted. The remaining part of the answer admits but a few of the material allegations of the complaint. If the portion of the answer in the form of a general denial is good, it puts at issue all the remaining allegations of the complaint material to plaintiff's right to recover, and not only compels the plaintiff to prove the issues on his part, but permits the defendant to disprove them; if it is stricken out, the defendant is deprived of his right to disprove the allegations, and they are taken as admitted against him. The order striking out, therefore, goes to the merits of the action, and is appealable. *Starbuck v. Dunklee*, 10 Minn. 173, (Gil. 136).

Upon the merits of the motion we think it should not have been granted.

The statute provides that the answer shall contain (1) a denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. Gen. St. p. 460, § 79. The statute prescribes no particular form of denial, nor does it make any distinction between general and specific duties. [denials?]

The sufficiency of a general denial, where it puts in issue the substance of the allegations to which it is addressed, cannot now be questioned. This form of general denial has been in general use by the profession since the adoption of the Code, and has been repeatedly recognized and sustained by this court. *Bond v. Corbet*, 2 Minn. 248, (Gil. 209); *Caldwell v. Bruggerman*, 4 Minn. 270, (Gil. 190); *Starbuck v. Dunklee*, 10 Minn. 173, (Gil. 136); *Montour v. Purdy*, 11 Minn. 401, (Gil. 278).

The certainty required in pleading is that the allegation must be so certain and explicit as to exclude ambiguity, and make the meaning of the averments clearly intelligible. *Could*, Pl. c. 4, § 24, p. 180.

Any language in an answer, therefore, which clearly indicates the allegations which the pleader intends to controvert, and denies with certainty the substance of such allegations, is sufficient.

If a complaint alleges a fact which is qualified by a particular intention, or by its connection with other facts alleged in the pleading there is no reason why the simple fact may not be admitted, and the qualifying facts or circumstances be denied; nor do we see any reason why, in case of an allegation embracing a fact and a qualifying intention, a general denial of the allega-

tion, except as afterwards admitted, followed with an express admission of the simple fact, is not sufficient to put in issue the intention alleged, and is not sufficiently definite and certain. If the legal effect of express statements or admissions is to qualify or deny any of the allegations in the complaint, it is no objection to the answer that such effect is not expressly stated in the answer. The answer in this case purports to deny each and every allegation in the complaint, except as afterwards stated, admitted, or qualified in the answer. If there is no ambiguity in what is afterwards stated, admitted, or qualified in the subsequent portion of the answer, the pleading is sufficiently certain. The statements and admissions in the answer are express and unambiguous, and there can be no reasonable doubt as to what the pleader intended to state and admit.

We are therefore of opinion that the answer is sufficiently definite and certain as to the portions of the complaint which the pleader intended to controvert.

The question then remains whether the denial in the answer is sufficient in form to put in issue the portions of the complaint which it purports to deny. The language of a general denial, considered in reference to the allegation it purports to deny, may be such as to be a denial in form only, and not in substance. An instance of this kind is found in the case of *Dean v. Leonard*, 9 Minn. 190, (Gil. 176), or it may be uncertain, as in *Starbuck v. Dunklee*, 10 Minn. 168, (Gil. 136). But the case under consideration differs from these. The defendant in this case "denies each and every statement and averment, and every part of the same, in said amended complaint as therein stated or otherwise." This, we think, is a denial, in form and substance, of the allegations controverted. It would be unreasonable to suppose that the pleader intended to deny a portion of a sentence composing an allegation in the complaint, and the only reasonable construction, to give the language any effect, is that he intended to deny everything which in legal effect was embraced in the allegation. The respondent also urges that "the denial, when coupled with the words immediately preceding, is bad. The defendant shows to this court, and states *that* he denies," etc. We italicize the word "*that*" for our own convenience. Whether the principle embraced in this objection is true or not, we need not determine. The language of this answer is: "The separate answer of said defendant * * * shows

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to this court and states: *First*, the said defendant denies," etc. The rule contended for by the respondent of course would not be applicable here.

The order granting the motion to strike out is reversed.

WILSON, C. J., dissenting. The defendant in this case makes certain specific admissions and denials, but leaves most of the material allegations of the complaint unanswered, except by the language stricken out as indefinite and uncertain. A mere denial does not make a material or certain issue on many of the averments which the defendant thus attempted to traverse. The plaintiff charges: "That on the twelfth of September, 1865, the said defendants, Remembrance R. and Francis Gilman were jointly and severally indebted unto the said plaintiff; * * * that on the said twelfth day of September, 1865, they, the said Remembrance R. and Francis Gilman, by and through said Francis Gilman and the plaintiff, had an accounting and settlement together of and concerning said indebtedness, whereupon there was found to be due and owing from said Remembrance R. and Francis Gilman, and each of them, to the said plaintiff, the following sums, to-wit: On account of moneys loaned to them as aforesaid the sum of \$691; for said horse, so sold and delivered as aforesaid, the sum of \$125; and on account of work and labor and services so rendered as aforesaid, the sum of \$259. That thereupon and in consideration of said indebtedness, and to pay, cancel, and discharge the same, and for the further consideration of the further sum of \$125, thereafter to be paid by said plaintiff, they, the said Remembrance R. and Francis Gilman, did bargain and sell unto said plaintiff, the southerly five acres of said tract of land above described, at and for the price of \$240 per acre."

We might add other allegations, but these are sufficient for illustration. A mere formal traverse of any of these makes no material issue. For instance: a denial that the defendants were indebted to the plaintiff in the sum of \$691 may be true, and yet they may be indebted to him \$690; or a denial that on a given day they contracted with him, or were indebted to him, is consistent with the fact that they contracted with him, or became indebted to him on the next subsequent day, and the time being immaterial, the issue thus raised is immaterial. This form of negative expression, called in the pleading a negative pregnant, implies an affirmative. The denial that the defendant

did not owe \$691, admits by implication that they owed a lesser sum, but does not state how much. It is therefore indefinite, ambiguous, and bad. *Lynd v. Picket*, 7 Minn. 194, (Gil. 128); 1 *Chitty*, Pl. 613; *Dean v. Leonard*, 9 Minn. 193, (Gil. 176). Our statute has abolished the general issue, and requires a denial of *each* allegation of the complaint controverted. A denial that is insufficient, when applied to a particular allegation, cannot be good merely because it in terms applies to every allegation of the pleading. A material and certain issue should be made on every allegation, separately considered, which the pleader wishes to controvert. The plaintiff might, perhaps, have disregarded the denial in this case, and treated the allegations of the complaint, on which a material issue could not thus be made, as admitted. But our statute provides that when a pleading does not conform to the statute, or is so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may strike it out on motion, or require it to be amended.

The course to be pursued in such cases is a matter of practice, resting in the discretion of the court below, not subject to review here. I do not wish to be understood as questioning the sufficiency of a general denial, as it is called, of each allegation of a pleading where a specific and separate denial would be sufficient. Such denials have long been sanctioned in practice, and are, perhaps, not inconsistent with the letter or spirit of the statute; but when a denial is ambiguous, and does not raise a material issue, it is insufficient whether directed to one, or to more than one, of the allegations of a pleading. The argument that this construction would make the practice laborious, cannot prevail against the clear language and meaning of the statute.

But if we were at liberty to discuss the propriety of the rule, it would not be difficult to show that it should be as now established. The true object of pleading is to apprise the adverse party of the claim or defence, so that he may not be taken by surprise, or put to the trouble and expense of preparing to meet that which is not to be proven against him, or to establish that which could not be truthfully denied. A pleading that fails to show the true and whole ground of action or defence, does not conform either to the requirement of justice or the statute. It is much more convenient and inexpensive for a

pleader to specifically affirm or deny, than for a party to produce evidence to establish or disprove a particular matter or thing. I do not understand my brethren to hold that if the portion of the answer stricken out was a mere denial it would be sufficient, but that the form of expression used has the effect and meaning that a simple denial would not. In this view, as applied to this case, I am unable to concur. If the word "statement" or "averment," in the language stricken out, is used in the sense of a "single distinct proposition," as I think it is, then the words "and every part of the same" are meaningless and inoperative, for a denial of a part of a distinct proposition, or of any assemblage of words not forming complete sense, cannot be admissible; and admitting that the language used was intended and operates as a denial of each and every averment, statement, or proposition, it is not good, for a mere denial of some of the averments is not, as we have above attempted to show, sufficient. I am unable to see that the words, "or otherwise," in the connection in which they are used, have any meaning whatever.

LONG v. LONG.

79 Mo. 644. [1883.]

PHILIPS, C. * * * The reply was made *in solido* to all the counts, and begun thus: "Now comes plaintiff, and for reply, says he denies each and every allegation in said answer not herein admitted or otherwise pleaded to." It then proceeded to set out the making of the loan of the \$4,000, on the 18th day of December, 1875, and the delivery of the deed on the 30th day of December, 1875; that before the maturity of the notes, the said Bulls, in the usual course of business for valuable consideration, sold and assigned said notes to said Goodman; that said transfer of said notes was before the breach of the conditions of the deed of trust. The reply then set up a subsequent sale of this property and the purchase thereof by plaintiff under another deed of trust, but as that occurred long after ouster laid, and this action was begun, it is not necessary to take further notice of it.

The defendant moved the court to strike out the reply for

the reason, among others, that it is not responsive to the issues; that it neither confesses nor avoids; that it does not reply to each separate count; because the new matter constitutes no defence, and the answer is vague and uncertain and tenders no specific issue for trial. This motion was overruled, and thereupon the defendant filed motion for judgment on the pleadings. This the court also overruled.

So much of the evidence as is material to the decision of this case will be noticed in the opinion in its proper connection. The court, sitting as a jury, found the issues for the plaintiff, and assessed the damages at \$500, and monthly rents at \$50. The defendant has appealed to this court.

1. The reply in this case is bad pleading, and ought to be discouraged. The reply to new matter in the answer is similar to the answer to the petition, and it may contain a general or special denial. Vansant Plead., 408, declares that the "code allows the defendant to elect whether he will answer by a general or special denial, and having elected, he is bound by it. He cannot answer in both ways." Dennison v. Dennison, 9 How. Pr. 247, is cited in support. We are not prepared to say that both modes of pleading may not be employed in the answer or replication. But we do not hesitate to hold that when both are employed the denials ought to be so framed as to leave no doubt in the mind of the court and the adverse party as to what is denied and what is admitted. This course not only sharpens the issues, but it aids in the preparation of evidence and lessens expenses in bringing witnesses to meet matters not designed to be controverted at the trial. This reply says: "Plaintiff denies each and every allegation not herein admitted or otherwise pleaded to." Then what is admitted or otherwise pleaded to? To determine this the opposing counsel and the court must go through the pleading analytically, step by step, to discover what perchance may be admitted or denied. Bliss Code Pleading, section 331, says, the pleader should so frame the denial as not to leave his adversary to thus hunt through the plea to see what is or is not therein "admitted." The object of pleading, especially under our code, is to form specific and definite issues of fact. When the answer, as in this case, tenders many issues of fact in different counts, affecting the integrity of plaintiff's title relied on as the basis of his recovery, he ought to answer all the allegations, either by denying or admitting them. The

*The plea
here is bad*

knowledge, except as to the matters stated on information and belief, and as to those matters he believes it to be true.

DAVID J. TYSEN.

Sworn this 11th day of June,
1870, before me,

CHARLES NETTLETON,

Notary Public, for N. Y. County.

The motion to strike out this answer as sham was based upon the affidavits of the plaintiffs and others strongly tending to show its falsity.

GROVER, J. The order is appealable to this court, and must be reviewed in the same manner as it was required to be by the General Term, upon the appeal taken to that court by the defendant. (Code, § 11, subd. 4). The entire answer of the defendants was struck out. It was a general denial of the complaint. It was verified by the defendant before service in the manner required by the Code when the complaint is verified. The motion to strike it out was made upon affidavits tending to show its falsity, and the court arriving at this conclusion, made the order striking it out as a sham. The Code (§ 152) provides that sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may in their discretion impose. This answer is the equivalent of and substitute for the general issue under the common law system of pleading. It gives to the defendant the same right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery as was given by that plea. Under the common law system, the general issue could not be struck out as sham, although shown by affidavits to be false. (Broome Co. Bank v. Lewis, 18 Wend. 565.) This was not upon the ground that a false plea was not a sham. That was always so regarded, but upon the ground that a party making a demand against another through legal proceedings was required to show his right by common law evidence, and that *ex parte* affidavits were not such evidence. The court, under that system, exercised the power of striking out pleas setting up affirmative defences as sham when shown by affidavits to be false, but not where the party verified such plea by affidavit. (Stewart v. Hotchkiss, 2 Cow. 634.) It has been claimed, and the claim somewhat sanctioned by the Supreme Court, that these rules have been changed by section 152 of the code. That by this all distinctions in strik-

ing out answers between such as merely deny the allegations of the complaint either generally or specifically, and those setting up affirmative defences, have been abolished. This question must be regarded as original in this court, notwithstanding the claim that this construction was adopted in *The People v. McComber* (18 N. Y. 315). A close examination of this case shows that this point was not involved. It is true that an opinion sustaining the construction contended for was given by STRONG, J.; but the case shows that Judges DENIO and HARRIS dissented from this opinion, although concurring in the affirmance of the judgment upon the ground that the point was not involved. This case cannot, therefore, be regarded as an authority for the construction insisted upon. The section in question simply confers power upon the court to strike out sham and irrelevant answers and defences. This power the court, as we have seen, possessed and exercised under the pre-existing laws. For reasons deemed satisfactory it was not extended to the general issue. When this was interposed as a defence the party had a right to a trial by jury. This right is secured to him by section 2, article 1, of the Constitution. This right could not be taken away by simply changing the name from that of general issue to that of general denial. We have seen that the latter is the substitute for and the equivalent of the former, so far as to require proof by the plaintiff of all the material facts showing his right of recovery. This is an argument tending to show that the Legislature, in the passage of the section in question, only intended to sanction the existing practice, and not to confer any new power upon the court.

Under the construction claimed, there is nothing to prevent the trial of this or any other issue upon affidavits. The moving party has only to satisfy the court by a preponderance of evidence of this character of the falsity of the plea, and it may be struck out, although specifically verified by the party interposing it, notwithstanding such party may insist upon his right to a trial, when he can have the privilege of cross-examining the affidavits, and having their credibility passed upon by a jury. I think that by the true construction of the section, the power of the court to strike out pleadings was not extended beyond what it was under the pre-existing law. That we have seen extended only to such affirmative defences as were not verified by the oath of the defendant or other equivalent evidence. It may

be said that a motion to strike out a pleading is not the trial of an issue joined thereby. This is literally true, but in substance the difference is scarcely perceptible. It calls for a determination whether the pleading be true or false; and if found false and struck out, the defendant is as effectually deprived of any benefit therefrom, as if found false upon a verdict, although he can derive no benefit from a failure to find it false, for the plaintiff will still be entitled to a trial of the issue. It will thus be seen that all the plaintiff hazards by the motion is the costs, while the defendant is precluded by an adverse result. It may be said that the power claimed will only be exercised in clear cases, where it is manifest that the desire of the defendant is only for delay, and that he is practicing a fraud for this purpose by putting a falsehood upon record. Concede the construction of the section claimed by the respondent, as we must to sustain the order, and its exercise cannot be confined to this class of cases. The judgment of the court must be exercised upon the affidavits, and if satisfied of the falsity of the pleading, although sustained by opposing affidavits, it becomes a duty so to decide by granting the motion. It is in the power of the plaintiff, in every case, as was done in this, to preclude the defendant from interposing either a general denial or a denial of specific facts by verifying his complaint. Thus he can prevent such answer, unless from the affidavit of the defendant it shall appear that it was interposed in good faith. The Code, it is true, allows the defendant to deny any knowledge or information sufficient to form a belief, and thus put the fact in issue. If he verifies this, what right has the plaintiff to strike out his answer by producing affidavits showing the truth of such facts of which the defendant was ignorant at the time of putting in his answer. Such affidavits fail entirely to show that the answer was put in in bad faith, or that it was false; and yet this is the very class of cases where the court will be most frequently called upon to strike out the answer. If the defendant commits perjury in verifying the answer, as he must have done in this case, if he knew the allegations of the complaint were true, he ought to be prosecuted therefor. If plaintiffs, who complain of injury from delay by the fraudulent interposition of false answers, would perform the duty incumbent upon every good citizen, to prosecute those known to be guilty of perjury, they would effectually stop such an abuse. I am satisfied that the intention of the Legislature in

enacting the section of the Code under consideration, was not to confer any new power upon the court, but to give legislative sanction to that exercised under the existing law. The order appealed from must be reversed, and an order entered denying the motion; but as the practice under which it was made had the sanction of some reported cases in the Supreme Court, it should be without costs to either party.

All the judges concurring, order reversed.

CANFIELD v. TOBIAS.

21 Cal. 349. [1863.]

COPE, J., delivered the opinion of the court—FIELD, C. J., and NORTON, J., concurring.

This is an action to recover a balance alleged to be due on an account for goods, wares, and merchandise. The plaintiff obtained a judgment upon the pleadings, and the only question is as to the sufficiency of the answer.

The answer admits that the indebtedness once existed, but avers that certain promissory notes, signed by the defendants and indorsed by a third person, were received by the plaintiffs in satisfaction of the debt. It contains a copy of a receipt purporting to have been signed by the plaintiffs, acknowledging that the notes were received in full payment of the amount due, and avers that the notes themselves have been paid. For the purposes of the case, the matters set forth in the answer are to be taken as true, and there is no doubt that these matters, relieved of other considerations, constitute a defence to the action. It is claimed, however, that the answer fails to deny, or denies insufficiently, certain allegations of the complaint charging the defendants with fraud and misrepresentations in procuring the assent of the plaintiffs to the arrangement referred to. The character of the arrangement is fully set forth in the complaint, and the allegations upon the subject were inserted by way of anticipation, and not as a part of the cause of action necessary to be stated in the first instance. They are not, therefore, such allegations as were required in the complaint, and treating the denials in the answer as insufficient to raise an issue upon them, the

question occurs as to whether they are to be acted upon as admitted. The statute provides that every material allegation in the complaint, not specifically controverted by the answer, shall be taken as true; and a material allegation is defined to be one which is essential to the claim, and cannot be stricken from the pleading without leaving it insufficient. (Prac. Act, secs. 65, 66). It would seem from this that an allegation which is not essential to the claim, and which, therefore, is an immaterial one, is not an allegation necessary to be controverted by the answer, in order to avoid the consequence attached to a failure in this respect as to a material allegation. The language used is equivalent to saying, that unless the allegation is essential to the sufficiency of the pleading this consequence is not to follow, for *expressio unius est exclusio alterius* is the rule in such cases. The only allegations essential to a complaint are those required in stating the cause of action, and allegations inserted for the purpose of intercepting and cutting off a defence are superfluous and immaterial. The matter alleged may be material in the case, but immaterial in the complaint, and a plaintiff cannot by pleading such matter at the outset call upon the defendant to answer it. He must plead it at the proper time and in pursuance of the rules regulating the course of proceeding, and he cannot anticipate the defence to be made and reply to it in advance. The object of such pleading is to put the adverse party upon his oath without making him a witness, and the effect of allowing it would be to establish a system of discovery in conflict with the spirit of the statute. We are of opinion, therefore, that the allegations in question are not such as the defendants were called upon to answer, and that no inference of their truth is to be drawn from a failure to deny them.

Judgment reversed and cause remanded.

for def.

HUDSON v. THE WABASH WESTERN RY. CO.

101 Mo. 13. [1890.]

SHERWOOD, J. This cause has been transferred to this court under the provisions of section 6 of the constitutional amendment respecting such transfers. The action is for damages caused by injuries to plaintiff.

The petition, after certain recitals as to the defendant being

a railroad corporation, sets forth certain ordinances of the city, then states:

That on the said 8th day of November, the defendant, unmindful of its duties in that regard, did, by its servants, carelessly, and negligently, and in violation of said sections 1234, 1235, 1237, and 1239, commit the following acts, to-wit:

“It did obstruct a street crossing, to-wit, Montgomery street, of said city, by permitting freight cars, propelled by steam power, to stand thereon longer than five minutes, and did not cause the bell of the engine to be constantly sounded when moving said cars at the place and time aforesaid, and did then and there back said cars, and did not have a man stationed on top of the car at the end of said cars, the same being a train of cars, farthest from the engine, to give danger signals, and did then and there move said train of freight cars without it being well manned with experienced brakemen at their posts, and so stationed as to see the danger signals and hear the signals from the engine, if any should be made; and did, then and there, by its servants in charge thereof, run its cars in said city across said street, the same being an improved street, as provided in said sections 1234, 1235, 1237, without any watchman being then and there stationed, as provided for in said sections 1234, 1235, who might have warned, as it would have been his duty to do, the plaintiff of his danger of being injured, as he then and there was, as hereinafter stated, and defendant did, then and there, after having left its cars standing across said street as aforesaid more than five minutes, negligently move the same without any notice or indication to plaintiff that it was going to do so: that by reason of said careless and negligent acts of defendant, the plaintiff, without any fault on his part, was caught between two of said cars, then and there, and had his foot smashed, torn and broken, so that he has since then been unable to work, to his loss and damage on that account of four hundred dollars, and has been and will be, put to great expense for medical services on account of said injuries to the amount of one hundred dollars; and did suffer great pain of body and mind, and has been permanently maimed and crippled by reason of said injuries to his damage in the sum of two thousand dollars, wherefore plaintiff prays judgment against defendant for the sum of twenty-five hundred dollars and his costs.”

The answer was as follows: “Now comes the defendant in

On motion some other states, the question of Stat. of Lim. is raised by demurrer; hence plain. can properly negative this defence in his complaint. But

the above entitled cause, by its attorneys, and, for answer, to the petition of plaintiff therein filed, admits that it is, and was on the eighth day of November, 1887, a corporation engaged in operating cars and locomotives propelled by steam power in the city of St. Louis and the state of Missouri, and as such corporation was duly incorporated under the laws of the state of Missouri. Defendant denies each and every other allegation contained and set forth in plaintiff's said petition. Wherefore, having fully answered, defendant prays to be discharged with its costs." * * *

I. It is the unquestioned law of this state that contributory negligence is strictly an affirmative defence; and, in order to avail a defendant as a matter of pleading, it must be affirmatively pleaded. *O'Conner v. Railroad*, 94 Mo. 155, and *cas. cit.*; *Donovan v. Railroad*, 89 Mo. 147; *Schlereth v. Railroad*, 96 Mo. 509. The contention is, however, made by the defendant that as the petition amongst other things alleged concerning plaintiff, "that by said negligent acts, and *without any fault on his part*, he was then and there caught between two of said cars," etc., and the answer denied this averment, that therefore the defence of contributory negligence was raised. This is a mistake. True, the case of *Karle v. Railroad*, 55 Mo. 482, apparently supports this contention, but the utterance there was only *obiter* and should not be regarded as possessing any authoritative value.

In many states (as at Wm. Va.) contributory negligence is a negative defence, i.e. "underlying guiltiness."

II. Besides, under our rulings, there was no manner of necessity for the petition to contain the allegations that the injuries were done to plaintiff "without any fault on his part." This follows as a corollary from the necessity of the defendant setting forth such a defence in his answer; the rule of the code being that "the defendant, by merely answering the allegation in the plaintiff's petition, can try only such questions of fact as are necessary to sustain plaintiff's case. If he intends to rely upon new matter which goes to defeat or avoid the plaintiff's action, he must set forth in clear and precise terms each substantive fact intended to be so relied on. It follows that whenever a defendant intends to rest his defence upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out according to the statute in ordinary and concise language, else he will be precluded from giving evidence of it upon the trial." *Northrup v. Ins. Co.*, 47 Mo. 444. That case was cited and approved in *Kersey v. Garton*, 77 Mo. 645.

IV. But while contributory negligence as a matter of defence has to be pleaded in order for a defendant to avail himself of it, by the introduction of evidence to sustain that issue, yet it does not thence follow that if the plaintiff's own testimony shows circumstances of contributory negligence which absolutely defeat his right of action and disprove his own case, that the defendant is not at liberty to take advantage of such testimony though produced by the adversary. On the contrary, it is well settled in this state, as well as elsewhere, that such advantage may be taken of the plaintiff's testimony, regardless of whether the special defence be pleaded or not. *Milburn v. Railroad*, 86 Mo. 104, and cases cited; *Schlereth v. Railroad*, 96 Mo. 509.

* * *

for def.

Judgment reversed.

COLUMBIA NAT. BANK v. WESTERN IRON AND STEEL CO.

14 Wash. 162. [1896.]

DUNBAR, J. The first count of the complaint alleged simply that the plaintiff was a national banking association, and that the defendant was a domestic corporation. The second count alleged the execution of the note in controversy, by the defendant; and the third, that no part of the same has been paid, and that the same was wholly due. The allegations of the direct answer were as follows: "(1) Defendant admits the allegations of paragraphs one and two thereof; (2) defendant denies each and every allegation in paragraph three thereof contained." And the answer then set up an alleged affirmative defence. The plaintiff denied each and every allegation of the affirmative answer, and moved for judgment upon the pleadings, which motion was sustained by the court; and judgment was rendered for the amount claimed in the complaint, after the taking of proof by the court of the amount due by defendant to plaintiff.

It is contended by the appellant (defendant below) that the court erred in sustaining respondent's motion for judgment on the pleadings; that the issue of payment of the note was squarely effected by the denial in appellant's answer to the third paragraph of plaintiff's complaint. We do not think this contention

"non-payment" is not a traversable allegation in the complaint. Non-payment is about the only essential allegation in the complaint.

can be sustained, under the law. In *Edson v. Dillaye*, 8 How. Prac. 273, the complaint alleged the nonpayment of the note. The answer admitted the making of the note, but denied the allegation of nonpayment of said note as set forth in said complaint, and also denied that defendants were indebted to said plaintiff for said note, or by reason of the making thereof, or that said note, or any part thereof, was justly due or owing by them. Held, "that all the allegations of the answer, after the admission of the making of the note, should be stricken out as frivolous." The court, in that case, construing a statute substantially like ours, said: "Under these denials, no new matter would be admissible in evidence. The plaintiff would have nothing to prove upon the trial, except it might be a computation of the interest upon the note, for the making of the note is admitted by the answer. He would only have to open his case to the jury, and demand their verdict, and there is nothing that the defendants could give in evidence under their answer. They could not prove payment, because they have not set it up in their answer; and so of any other imaginable defence. Having admitted the making of the note, and not having set up any fact showing why they ought not to pay it, their liability to pay it is a legal conclusion, from which the defendants cannot escape, as they have not prepared the way by their answer, for giving any defence in evidence." Bliss on Code Pleadings (section 357) lays down the rule that nonpayment is an affirmative matter, and must be pleaded as well as proved. See, also, *Bethel v. Robinson*, 4 Wash. 446, 30 Pac. 734; *Van Santv. Pl. Sec. 470*; *Houghton v. Townsend*, 8 How. Prac. 441; *Clark v. Spencer*, 14 Kan. 398. In *Hubber v. Pullen*, 9 Ind. 273, the court said: "The complaint, it is true, ordinarily avers that the instrument sued on has not been paid; still, proof of that averment is not required, and therefore it is not put in issue by a general denial." Outside of this question, the answer is so evidently a pleading of a negative pregnant that it could not be sustained as a denial of the allegations of the complaint, in any event. The affirmative matter pleaded in the answer so plainly fails to plead payment to the plaintiff in this action that we do not feel called upon to particularly discuss it. The judgment of the court will be affirmed.

for plain.

Def. should have pleaded payment
as a plea in discharge.

DUTCHER v. DUTCHER.

39 Wis. 651. [1876.]

Action for divorce, on the ground of adultery. The answer was a general denial.

RYAN, C. J. We do not understand the appellant's adulterous intercourse with his paramour to be questioned on this appeal. We understand his counsel to rest the appeal on two positions: first, that the respondent is not a resident, within the statute; and, second, that she had discovered the adulterous cohabitation of the appellant more than three years before suit brought. * * *

We are, therefore, of opinion that the respondent was in no sense a resident of this state within the meaning of the statute, at the time of the commencement of her suit.

But the question remains, whether the pleadings raise the issue of her residence. Her want of residence under the statute is clearly a personal disability, not affecting the present right of action, but only the present right to prosecute the action; a disability which might be cured; clearly matter of abatement, not of bar. "Whenever the subject matter of the defence is that the plaintiff cannot maintain any action, at any time, whether present or future, in respect of the supposed cause of action, it may and usually must be pleaded in bar: but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should in general be pleaded in abatement." 1 Chitty's Pl. 446. "All declinatory and dilatory pleas in equity are properly pleas, if not in abatement, at least in the nature of pleas in abatement; and, therefore, in general, the objections found thereon must be taken *ante litem contestatam* by plea, and are not available by way of answer, or at the hearing." Story's Eq. Pl., § 708. So Lord REDESDALE distinguishes pleas "that the plaintiff is not entitled to sue by reason of some personal disability," and that "the plaintiff has no interest in the subject, or no right to institute a suit concerning it," from pleas in bar, and calls them pleas to the person of the plaintiff. Mitford's Pl., 220.

And the distinction is not one of form merely, but of substance. For, generally, judgment for the defendant on pleas in abatement, abates the action only; on plea in bar, bars the cause of action everywhere and forever. In the present case,

judgment against the respondent for want of residence within the statute, should not operate to bar another action here, if she should have acquired a residence; or elsewhere, at any time or under any circumstances.

The code does not touch the distinction between defences in abatement and defences in bar, or the legal effect of judgments upon them. It does indeed modify the manner, form and time of putting in such defences, but does not confound them or their consequences. Formerly, pleas in abatement and pleas in bar must have been separately and successively pleaded in that order; now, matter of abatement and matter of bar may be set up as separate defences in the same answer. *Freeman v. Carpenter*, 17 Wis. 126. Whether they may be successively pleaded and tried; or, being pleaded together, may be separately tried, are questions not now before us.

If certain matters in abatement are apparent in the complaint, they are ground for demurrer under the code. But if matter in abatement, not apparent in the complaint, be relied on as a defence, it must be specially pleaded in the answer. Ch. 125, secs. 5, 8, R. S.

A general denial is a plea in bar, not broader at least than the general issue at common law, and cannot raise any defence by way of abatement. *Martin v. Pugh*, 23 Wis., 184; *Sanford v. McCreedy*, 28 id. 103; *Ewen v. Railway Co.*, 38 id. 613. Judgment for the defendant upon a general denial, is a general judgment: a bar to all future actions for the same cause.

And it would be a cruel abuse that it should go upon a defence in abatement, concealed *in gremio*. The code intended no such perversion of justice. And it is well settled in this court that matter in abatement, not apparent in the complaint, must, like other special defences, be specially pleaded in the answer. *Freeman v. Carpenter*, *Sanford v. McCreedy*, *Ewen v. Railway Co.*, *supra*; *Moir v. Dodson*, 14 Wis. 279; *Cord v. Hirsch*, 17 id., 403; *Kimball v. Noyes*, id., 695; *Harbeck v. Southwell*, 18 id. 418; *Bevier v. Dillingham*, id., 529; *Wilson v. Jarvis*, 19 id. 599; *Robbins v. Deverill*, 20 id., 142; *Supervisors v. Hackett*, 21 id., 613; *Lefebvre v. Utter*, 22 id., 189; *Quinn v. Quinn*, 27 id., 168; *Noonan v. Orton*, 34 id., 259; *Wittman v. Watry*, 37 id. 238; *Smith v. Peekham*, ante, p. 414. This point was overlooked at the bar, and therefore not passed upon by the court, in *Hall v. Hall*, 25 Wis. 600.

There is a strong analogy between this question and the questions of jurisdiction in the federal courts, resting on the citizenship of parties. In those courts, all objections founded on citizenship of the parties must be specially pleaded in abatement, or they are waived. *Conard v. Insurance Co.*, 1 Pet., 386; *D'Wolfe v. Rabaud*, id., 476; *Sheppard v. Graves*, 14 How., 505.

The appellant contends that the defence here is in the nature of a plea to the jurisdiction. We do not think so, but need not discuss the point. For by all the authorities the rule equally applies to pleas to the jurisdiction, which, if not strictly pleas in abatement, are in the nature of pleas in abatement. See *Chitty*, *Story*, *Mitford*, *ubi supra*.

The defence, therefore, that the respondent was not a resident of the state, though well founded in fact, was inadmissible under the pleadings in this case.

*for ~~def~~ claim Judgment reversed.**

DONK BROS. COAL & COKE COMPANY v. ARONSON.

102 Mo. App., 590. [1903.]

REYBURN, J. This action for balance of account for goods sold and delivered, brought originally against four defendants, but dismissed as to one, proceeded to trial before the court as a jury; defendants were sought to be charged as co-partners under the firm name of Mound City Coal & Ice Company. Defendant, Jacob Lippe, for separate answer pleaded, that he was not a partner with his co-defendants under the partnership title, or at any other time averred; that he was not a partner with said parties nor in the Mound City Coal & Ice Company in any manner or capacity during the time set forth, and that he never at any time or in any manner had contracted the debt sued on by plaintiff, and was not indebted to plaintiff, and this answer was verified by the affidavit of this defendant.

The plaintiff offered evidence to establish the correctness of the account sued on, and rested without tendering any proof of the persons composing the alleged co-partnership of the Mound City Coal & Ice Company. The defendant, Jacob Lippe, thereupon asked the following declaration of law:

*Compare *Cohn v. Ry.*, 182 Mo. 577.

See Goss v. Walls, 206 Mo. 273, Held

"The court declares the law to be that under the pleadings and evidence in this case, they must find a verdict in favor of the defendant, Jacob Lippe," which the court refused to give and gave the declaration prayed by the plaintiff thus:

"The court declares the law to be that under the pleadings herein, the partnership of Jerome W. Aronson, Henry Aronson and Jacob Lippe is admitted as charged in plaintiff's petition, said co-partnership not having been denied by affidavit filed with the pleadings in the cause."

Defendant Lippe thereupon asked leave to file an affidavit to conform to the ruling of the court, which was as follows:

"State of Missouri, City of St. Louis, ss.—Jacob Lippe, being duly sworn on his oath states, that he was not at any time of the times stated in the petition in the above entitled cause, a member of any firm doing business under the name of Mound City Coal & Ice Company, and that he is not a partner with any of the co-defendants named in the petition in any manner at any time stated in the petition—Jacob Lippe."

The court denied leave to file the affidavit and rendered judgment against all the defendants for the amount claimed with interest accrued. Respondent Lippe alone filed a motion for a new trial which the court sustained and the plaintiff has appealed.

Section 746, Revised Statutes, 1899,* *inter alia*, provides "and where plaintiff or defendant sues or is sued as a corporation, and where plaintiffs or defendants sue or are sued as a partnership, and the names of the several partners are set forth in the peti-

**Instrument executed by opposite party, and certain provisions evidence, when.*—When any petition or other pleading shall be founded upon any instrument in writing, charged to have been executed by the other party and not alleged therein to be lost or destroyed, the execution of such instrument shall be adjudged confessed, unless the party charged to have executed the same deny the execution thereof, by answer or replication, verified by affidavit. And where plaintiff or defendant sues or is sued as a corporation, and where plaintiffs or defendants sue or are sued as a partnership, and the names of the several partners are set forth in the petition or answer, it shall not be necessary to prove the fact of such incorporation or partnership, unless the opposite party put such fact in issue by affidavit filed with the pleadings in the cause. And when it is alleged in any pleading that any county or township has in force therein any of the provisions of article II, chapter 69, Revised Statutes of 1899, restraining domestic animals therein named from running at large, it shall not be necessary

Only executed
to Rule 1
a general
denial to
verses w
allegations
in the cor
plaint.

tion or answer, it shall not be necessary to prove the fact of such incorporation or partnership, unless the opposite party put such fact in issue by affidavit filed with the pleadings in the cause." The then able presiding judge of the Kansas City Court of Appeals has ably portrayed the object of this provision of the statute in *Haysler v. Dawson*, 28 Mo. App. 531, stating its design to be to make the party first purge himself of the imputation of a mere dilatory plea, and relieving the opposite party of the necessity of making proof unless put in issue in the statutory method.

The question here presented appears not to have been directly presented to this court, but in *Walker v. Point Pleasant*, 49 Mo. App. l., c. 247, the judge announcing the decision, by implication would have held a verified plea or answer supported by the affidavit denying the corporate existence of a municipal corporation, a compliance with the statute then in force, if the question had then been before him for decision. Nor does the Supreme Court seem to have been expressly called upon to determine the point here made by appellant, though again inferentially, language adopted in *Short v. Taylor*, 137 Mo. l., c. 525, and *Flynn v. City of Neosho*, 114 Mo. l., c. 573, strongly incline toward the position contended for by respondent.

In *Meyer Bros. v. Ins. Co.*, 73 Mo. App. l., c. 169, when the Kansas City Court of Appeals was first invited to construe the above provisions of the statute, the court held where the answer of defendant, sued as a corporation, specially denied its corporate existence, and was verified by affidavit, that under the statute, if defendant had desired to put in issue its corporate existence it should have done so in the manner required by the statutory provision by affidavit filed with the pleading, but it was further held that the defendant, a private corporation, was concluded from such denial in this case, by appearing and defending in its corporate name, and one judge dissented from the para-

to prove that fact, unless the opposite party put such fact in issue by affidavit filed with the pleadings in the cause.—*R. S. 1899, sec. 746.*

Preceding section construed.—The preceding section shall not be construed to authorize any instrument of writing to be received in evidence, without proof of its execution, in any suit against an executor or administrator, or any other person representing the person charged to have executed such instrument, nor any county, city, or town sued upon any instrument alleged to have been executed by such county, city or town, or any corporate authorities.—*R. S. 1899, sec. 747.*

*Code has made no change in spec-
ific denial; same as at common
law. Denial must exactly meet
the facts intended to be denied. In*

graph of this opinion holding that the answer did not put in issue the corporate existence of the defendant.

In *Richards v. McNemee*, 87 Mo. App., 396, the same court all the judges concurring, with the only change in its individuality the succession of the judge rendering the decision vice the judge dissenting in the former case of *Meyer v. Ins. Co.*, had again presented the similar question respecting the existence of a partnership challenged by answer authenticated by jurat. In the original opinion, the ruling in *Meyer Bros. v. Ins. Co.*, was adhered to, and it was held that it was not sufficient to merely swear to a pleading filed in the case, which denied the partnership or incorporation, but to answer the terms of the statute, the affidavit of itself must contain all necessary denials (l. c. 401). Upon motion for rehearing, the court modified its former ruling, and announced as its conclusion, that such a construction of the statutory provision was too technical, in view of what was generally understood as necessary to constitute an affidavit. In this latter expression of the Kansas City Court of Appeals we concur, believing that the actual evil sought to be remedied by this legislation is reached, and the true object of the statute attained by the proper verification of a plea traversing the existence of a partnership or corporation, without incorporating such denial in a separate paper and affidavit.

The judgment is affirmed. BLAND, P. J., and GOODE, J., concur.

WILLIAMS MOWER & REAPER CO. v. SMITH.

33 Wis. 530. [1873.]

COLE, J. The only question in this case is, whether, when a suit is brought by a foreign corporation and the defendant answers the general denial merely, this dispenses with the necessity of proving the corporate existence of the plaintiff on the trial? The circuit court held that the corporate existence of the plaintiff was put in issue by such an answer, and, there being no proof upon that point, granted a nonsuit. We think this ruling was erroneous under the provisions of our statute. Sec. 3, ch. 148, R. S., provides that in actions by or against any corporation created by or under any statute of this state, it shall not be

General denial involves no such risks. Code has substituted general denial for general traverse. Difference of form, since now we have one denial for all actions not a different one for each form

necessary to prove on trial the existence of such corporation, unless the defendant, in his answer, shall have denied that the plaintiff is a corporation, and annexed thereto an affidavit of the truth of such an answer. This provision plainly dispenses with the necessity of proving its corporate existence where only the general issue is pleaded, so far as domestic corporations are concerned. The *Central Bank of Wisconsin v. Knowlton*, 12 Wis. 624. By sec. 11, ch. 148, *supra*, it is enacted, that a foreign corporation created by or under the law of any other state, government, or country, may prosecute in the courts of this state in the same manner as corporations created under the laws of this state, upon giving security for costs as nonresident plaintiffs are required to do. This section places a foreign corporation on the same footing precisely as a domestic corporation in respect to the prosecutions of action, with the single exception that it is required to give security for the payment of costs. This is the plain language, and seems to be the spirit, of this provision; and as a domestic corporation is not required to prove its charter on the trial, unless the defendant in his answer has denied the existence of the plaintiff's corporation, and annexed thereto an affidavit of the truth of the answer it follows that a foreign corporation need not prove its act of incorporation unless its existence is denied in a like manner. * * *

Judgment reversed.

Section 2. New Matter.

X CARTER v. EIGHTH WARD BANK.

67 N. Y. Supp. 300. [1900.]

On demurrer to certain paragraphs of an answer to a complaint in an action for the conversion of checks and drafts.

GAYNOR, J. (after holding that the complaint was sufficient):

After making a general denial, the answer pleads nine separate defences; or as we sometimes say, "affirmative defences"; but that is only tautological, for every "defence." (i. e., that which is called a "defence" in pleading) can only consist of new affirmative matter, and the burden of proof is on the defendant to affirmatively establish such defence of new matter. Code Civ. Proc. § 500; *Cruickshank v. Publishing Co.*, 32 Misc. Rep. 152,

65 N. Y. Supp. 678, and cases there cited; *Durst v. Railroad Co.*, 67 N. Y. Supp. 297. And each of these defences is demurred to on the ground "that it is insufficient in law upon the face thereof." Code Civ. Proc. § 494.

Before inquiring into the sufficiency of these defences, it seems necessary to refer to the way in which the sufficiency of a defence (i. e., an affirmative defence) has to be tested. I had not supposed a word could be said, much less needed, on the point until my attention was called to an observation in the opinion of Chief Judge Andrews in *Douglas v. Insurance Co.*, 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, and the apparently strange application of it in *Wiley v. Village of Rouse's Point*, 86 Hun, 495, 33 N. Y. Supp. 773. The remark of the learned chief judge is as follows:

"The allegations of the complaint not denied in the affirmative defence are for the purpose of the question now presented to be deemed admitted. The affirmative defence is to be treated as a separate plea, and the defendant is not entitled to have the benefit of denials made in another part of the answer, unless repeated or incorporated by reference and made a part of the affirmative defence."

I find much difficulty in getting any meaning out of this. What does it mean? An affirmative defence cannot consist of denials at all, and never could. It can by the express words of the Code consist only of "new matter" constituting a defence. First in an answer comes a denial or denials, if there be any, and then "defences," if there be any (i. e. "affirmative defences," as we sometimes say, as if there could be any other kind). A denial of allegations of the complaint, or any of them, can have no place in a defence. It would be wholly irrelevant and immaterial there, and on demurrer to the defence for insufficiency would have to be disregarded, for an answer, reply or demurrer to a complaint, answer or defence, as is well understood, raises no issue on immaterial or irrelevant allegations, but only on the material and relevant allegations. A demurrer to a defence is tested solely by whether there is "new matter" therein which constitutes a defence. If there be anything there which is not "new matter," it has no weight whatever. What then can be meant by saying that in considering a demurrer to a defence "the defendant is not entitled to have the benefit of denials made in another part of the answer," unless they be "repeated or in-

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corporated" in such defence? Such denials if repeated or incorporated in an affirmative defence could not be considered at all on the question of the sufficiency of such defence of new matter. They would be wholly immaterial and irrelevant there, and would be struck out on motion, if the plaintiff chose to make such motion, though that would be unnecessary.

Nothing can be better understood among us than that when a defence is demurred to its sufficiency has to be determined on the assumption that the complaint is true. If denials of allegations of the complaint could be a material and relevant part of a defence, and had to be considered there, it is obvious that the pleader could always prevent a defence from being demurred to by incorporating denials in it. Suffice it to say that what the Code calls "a defence" in pleading, and which we sometimes call an affirmative defence, can, by the express words of the Code, consist only of new matter, constituting a defence, i. e., new matter which, assuming the complaint to be true, constitutes a defence to it; from which it is obvious that a denial or denials of the complaint can be no part of such defence. If such a denial or denials could be a material and relevant part thereof, a defence would no longer be a defence and demurrable for insufficiency.

Each of these defences must therefore be tested as to its sufficiency by asking whether if all of the material allegations of the complaint be taken as true, the matter pleaded in such defence is nevertheless a defence to the cause of action alleged.

* * * *

Demurrer sustained.

For plain

GALLIMORE v. AMMERMAN ET AL.

39 Ind., 323. [1872.]

WORDEN, J.: Complaint by the appellant against the appellees, as follows:

"The plaintiff complains of the defendant, and says that, on or about the . . . day of March, 1871, the above named defendants, at the town of West Lebanon, assaulted the plaintiff, and with force compelled him to go from the street in said town, where he then was in the pursuit of his interest and pleasure, to a small shanty, so built with coarse boards as to be as cold and

comfortless as out door in the open air, and the defendants then and there imprisoned him, said plaintiff, and kept and detained him as a prisoner therein for the space of seventeen hours, contrary to the law of this state and against the will of the said plaintiff, by means of which he suffered great agony of body on account of cold and hunger, by means of which his health was greatly impaired, so that he was compelled to lose his time, not only during said false imprisonment, but ever since, on account of said exposure and imprisonment, and he was greatly injured in his name and credit. And he further avers that, during such false imprisonment, said defendants refused to allow him any food and nourishment whatever, and that the weather was very cold. And the plaintiff says that he is damaged, by means of the foregoing facts, in the sum of five thousand dollars; wherefore, " etc.

2. And for a further complaint, plaintiff says that the defendants, jointly acting, the said Miller as a justice of the peace within the town of West Lebanon, and the said Ammerman, acting as the marshal of said town, claiming to act by virtue of authority conferred on them by the corporate authorities of said town, arrested the plaintiff therein on the . . . day of March, 1871, and compelled him to go from the streets of said town, where he was in the pursuit of his pleasure and interest, to a small shanty built of coarse boards, so that it was as cold and comfortless as out in the open air, and then and there imprisoned the said plaintiff, without food or fire, for the space of seventeen hours, without giving him a trial of the pretended charge for which they elaim to have arrested him; and he avers that his trial was thus delayed, and he was thus detained, for no cause whatever, except the malice of the defendants. The charge upon which he was arrested was a violation of some pretended ordinance of said town, and no reasonable cause existed why he should not have been tried at once, without detaining him seventeen hours before trial. And he avers, that at the time of such arrest, to-wit, about five o'clock P. M., he had had nothing to eat since morning, at breakfast time; and they kept him thus confined, without anything to eat or nourishment, for the space of seventeen hours thereafter, and willfully refused to furnish him with any food or fire, or anything to keep him warm; and he says the weather was very cold at the time. He avers, by means of such exposure and harsh treatment, his health was

so impaired that he has been sick ever since, and suffered great pain of body and mind; by means of which he is damaged in the sum of five thousand dollars, for which he demands judgment," etc.

A demurrer was filed to the complaint, which was sustained to the first paragraph, the plaintiff excepting, and overruled as to the second.

The defendants answered the second paragraph, first, by general denial, and second, "that defendant, John Ammerman, was marshal of the town of West Lebanon, in Warren county, Indiana, on the 17th day of March, 1871; that on said last mentioned date, defendant John Miller was an acting justice of the peace, duly commissioned and qualified, in and for said town of West Lebanon; that on said 17th day of March, said West Lebanon was an incorporated town under the law of the State of Indiana in that behalf; that on said 17th day of March, an ordinance of said town of West Lebanon was in force, a copy of which is herewith filed, marked 'A,' and made a part of this paragraph of answer; that on said 17th day of March plaintiff came to said town of West Lebanon and became highly intoxicated, and went about the public streets and public places in said town while in that state, and then and there disturbed the peace and quiet of said town by making loud and unusual noise, and by using profane and indecent language therein, in violation of said ordinance; that thereupon, on said 17th day of March, defendant Ammerman, by virtue of his authority as marshal of said town, and seeing said plaintiff drunk, as aforesaid, and disturbing the peace, as aforesaid, arrested said plaintiff, and he, said plaintiff, being too drunk to be tried or plead to any charge of violation of said ordinance, placed him in the town prison, the same being a light, comfortable, plank house, and placed hay, blankets and quilts in said prison for plaintiff to sleep on; that on the next morning, to-wit, on the 18th of March, plaintiff was taken by said marshal before defendant John Miller, and having been arraigned before said Miller on a charge of drunkenness, disturbing the peace, and using profane language, in violation of the provision of said ordinance, for plea said he was guilty as charged; whereupon the defendant Miller fined the plaintiff five dollars and costs for his violation of said ordinance, which fine and costs plaintiff paid."

Accompanying the paragraph is the ordinance pleaded.

The plaintiff demurred to this paragraph of the answer, for want of sufficient facts; but the demurrer was overruled, and he excepted; and declining to reply, judgment was rendered against him.

The questions presented here involve the correctness of the rulings in sustaining the demurrer to the first paragraph of the complaint and overruling that to the second paragraph of the answer.

We are not favored with any brief on behalf of the appellees, and, therefore, are not advised what objection is supposed to exist to the first paragraph of the complaint, or upon what ground the demurrer thereto was sustained.

That paragraph charges that the defendants assaulted the plaintiff, and by force compelled him to go from the place where he was, to a shanty, where they imprisoned him, and detained him as a prisoner therein for the space of seventeen hours, against his will. No objection occurs to us, unless it be that the paragraph does not aver that the acts of the defendants were done illegally, or wrongfully or without any competent authority. But in our opinion no such allegation was necessary. As a general rule, a party is not required to allege more than he is bound to prove, in order to entitle himself to recover. The facts alleged, on being proved, would entitle the plaintiff, *prima facie*, to recover; and absolutely, unless it should be shown that the acts were rendered rightful and legal by some competent excuse or authority. Such excuse or authority must come from the defendant. "Whoever assaults or imprisons another must justify himself by showing specially to the court that the act was lawful." (1 Chit. Pl., 501.)

The paragraph is evidently drawn from a precedent for a declaration for false imprisonment, found in 2 Chit. Pl., 857, which contains no allegation that the acts were either wrongful, illegal, or without authority.

We are of opinion that the paragraph was good, and that the demurrer thereto was erroneously sustained. (*Colter v. Lower*, 35 Ind., 285.)

We come to the second paragraph of the answer, pleaded to the second paragraph of the complaint. It is objected by the appellant, that no valid ordinance is set out, but no objection to the validity of the one pleaded is pointed out, and we see none. It is further objected that the pleading in no manner identifies

the trespass justified with that complained of. The precedents for pleas justifying arrests under authority contain the averment that the trespasses justified "are the supposed trespasses in the said declaration mentioned, and whereof the said plaintiff hath above thereof complained against the said defendant." (3 Chit. Pl., 1081.) This, or some equivalent allegation, seems to be essential.

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In the paragraph under consideration, there is nothing to show that the arrest and imprisonment of the plaintiff which are justified, or attempted to be justified, are the same arrest and imprisonment of which the plaintiff complained. This objection is fatal to the validity of the paragraph. Some other objections are made to the paragraph, which need not be noticed, as one fatal defect renders the paragraph as bad as if there were many.

The demurrer to the paragraph in question should have been sustained.

The judgment is reversed, with costs, and the cause remanded, with instructions to proceed in accordance with this opinion.

Judgment reversed.

for plain.

BAUER v. WAGNER.

39 Mo., 385. [1867.]

HOLMES, Judge, delivered the opinion of the court.

This was an action of ejectment for the recovery of a small strip of land, part of a large lot, which had been sold as a portion of lot No. 337, in the city of Jefferson. The strip was eight inches in front, and about two feet in width, upon an alley in the rear. The several portions of this lot, No. 337, had been sold and conveyed to various persons at different times, by quantity in front feet, with some calls for adjoining lots, but without fixed land marks set upon the ground conveyed in each instance. The several proprietors had taken possession of their lots and improved the same, enjoying their possessions undisturbed for more than ten years; but upon an accurate survey being made, it appeared that they had not taken possession exactly according to the true lines, and that the defendant's possession and buildings encroached by the above quantity upon the land claimed by the plaintiff, and that he had so held possession for upwards of

at com. law, it was fatal to the concession if it was stated hypothetically. This was unduly technical. Now courts hold that the concession is not vitiated if made under pro-

twenty years. And there was evidence before the jury bearing upon the question of the adverse character of the possession. The jury rendered a verdict for the defendant.

The first question presented for our determination here arises upon a motion to strike out a part of the answer, which pleaded the statute of limitations in bar of the action in these words:

"That the said supposed cause of action of the said plaintiff, if any such he have, has not accrued within ten years next before the commencement of this suit, and pleads the statute of limitations in bar to any such supposed cause of action."

The objection seems to rest chiefly upon the ground that by reason of the words "if any such he have," the plea fails to confess and avoid the action. The statute of limitations must be specially pleaded, except where some express statute otherwise provides, and the nature of the plea is, that, admitting the plaintiff once had a cause of action, it avers that the same has been lost by reason of the lapse of the whole period of the statute bar. (2 Tidd's Pr., 647, 651; Ang. Lim. § 285; Bricket v. Davis, 21 Pick., 404.) The right to maintain this action depends essentially upon the determination of the question *when* the right of entry, or the cause of action, accrued; and if it did not accrue, or was not a subsisting cause of action, at any time within the period of the statute, it is barred and lost. (Ang. Lim. § 369.) It would seem to be very clear, then, that but for these words the statute would have been well pleaded, notwithstanding the useless addition of the latter clause, which by itself alone would be bad pleading. Pleading conditionally, or in the alternative, is not allowable, and should be avoided. In Gale v. Capern, 1 Adolph. & El., 102, a replication "that the said supposed debt and set-off did not accrue within six years," was held virtually to admit that the action had once accrued as alleged. In Margaret v. Bays, 4 Adolph. & El., 489, a plea that "the supposed debt, *if any such there be*, did not accrue to the plaintiff at any time within six years," was held bad on special demurrer, because it did not fully confess and avoid the cause of action. In this case, we think the language of the pleading may be taken as virtually admitting that the plaintiff once had a cause of action, and as only questioning its present existence. It is a mere matter of form, and the same strictness need not be insisted on under our practice, which has abolished the old special demurrer to mere matters of form. Besides that, whatever fault

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or error there may have been in this respect may be considered as fully cured, after verdict, by the operation of the statute of jeofails. We think there was no material error in overruling the motion. * * *

On the whole, the issue appears to have been fairly placed before the jury, under correct principles of law, and we discover no sufficient ground for disturbing the verdict.

Judgment affirmed. The other judges concur.

for def.

OCEAN STEAMSHIP CO. v. WILLIAMS.

69 Ga., 251. [1882.]

Williams brought an action against the Ocean Steamship Company of Savannah. His declaration contained two counts. The first count was for false imprisonment, and alleged that on the 11th day of January, 1882, the defendant, "with force and arms did unlawfully and wrongfully imprison and detain" him "in the police barraeks, falsely pretending that he was guilty of the crime of larceny from the vessel: that he was thereby deprived of liberty for twenty-six hours," was greatly harassed and oppressed, subjected to trouble and expense, deprived of employment, his character and reputation damaged, and he was put to great suffering. * * *

The defendant then filed a plea of justification, setting up as a defence the following facts: At the time of the arrest the plaintiff, as defendant's servant, was engaged in unloading one of the ships of the defendant. Just before the arrest, several pairs of stockings, pants and other articles of clothing in the custody of defendant as a common carrier were feloniously stolen, taken out and removed from the package in which they were delivered to defendant; these articles were found hidden away in the side of the ship, in the lower and upper between decks, to which the plaintiff and the gang with which he worked had access, and where they alone were employed in unloading. These articles were known by plaintiff to have been so stolen, and were feloniously taken and hidden by him with intent to steal the same off of said steamship. Wherefore defendant, having good and probable cause of suspicion, and suspecting said

plaintiff to have been guilty of or concerned in the stealing, did give the plaintiff in charge to a police officer and ex-officio constable of the city, and peace officer of the state, and requested him to take the said plaintiff into his custody and safely keep him until he could be carried and conveyed, and carry and convey him before some one of the justices assigned to keep the peace of the state of Georgia, to be examined by and before such justice, touching and concerning the premises, and to be further dealt with according to law; and said peace officer then and there did take said plaintiff into his custody, and as soon as conveniently could be done, the said plaintiff was carried in custody to and before M. F. Molina, one of the justices of the peace in and for the county of Chatham, in said state, and said plaintiff was by order of said M. F. Molina, justice of the peace as aforesaid, further detained until, upon the 12th day of January, 1882, the said plaintiff was discharged out of custody by the said justice of the peace. The time of imprisonment was a reasonable time for the purpose aforesaid, "which are the alleged trespasses in said declaration set out, and this the said defendant," etc.

Defendant's counsel claimed that the filing of the plea of justification gave them the opening and conclusion of the argument before the jury. The court refused to allow this claim, and permitted plaintiff's counsel to open and conclude the argument. * * *

HALL, Justice.

1. The first question to be considered in this case is, whether the amended plea of the defendant, filed and allowed during the progress of the trial, is a plea in justification of the plaintiff's arrest and imprisonment, or is merely an amplification of the general issue of not guilty? Without this plea, could the defendant, under the general issue, have introduced the evidence by which it sought to justify the plaintiff's arrest and imprisonment? The only count in the declaration on which the trial was had alleged that the defendant, on the day named therein, wrongfully and unlawfully imprisoned and detained the plaintiff in the police barracks of the city of Savannah, falsely pretending that he was guilty of the crime of larceny from the vessel; and that by reason thereof he was deprived of his liberty for the space of twenty-six hours, and was greatly harassed and oppressed, subjected to trouble and expense, deprived of em-

ployment, his character and reputation seriously damaged, and he was put to great suffering.

Now, what did the plea of not guilty put in issue, and what proof was admissible thereunder? "In trespass to the person, personal or real property, the defendant, under the general issue of not guilty, can give in evidence matter which directly controverts the facts of his having committed the acts complained of; as in trespass for assault and battery, with a tearing of clothes, a plea of not guilty of the assault made *modo et forma*, was held to operate as a denial of the battery and *laceravit* as well as the assault." (1 Chitty's Plead., 534, 535.) So our Code, § 3458, after defining what a plea of the general issue is, provides that no other evidence is admissible under such plea, except such as disproves the plaintiff's cause of action, and other matters in satisfaction (confession?) or avoidance must be specially pleaded. See upon this section 44 Ga., 199, which is fully in point with the present case.

In all such cases Mr. Chitty, 1 Plead., 535, says: "Matters in discharge or confession and avoidance of the action must be specially pleaded." Again, "the plea of not guilty, therefore, is proper in trespass to person, if the defendant committed no assault, battery or imprisonment; but in trespass to person *son assault demesne*, the moderate correction of servant, *molliter manus imposuit* to preserve the peace, or a justification in defence of the possession of real or personal property, by authority of law without process, as a private individual, must always have been pleaded specially." (Ib., 535, 536.)

"A plea," he says, "justifying an arrest of the plaintiff upon the ground that a felony had been committed, and that there was reasonable ground to suspect and accuse the plaintiff, must distinctly state the specific reasons for suspecting the plaintiff. And a plea justifying assault and imprisonment on the ground of a breach of the peace committed by the plaintiff, must show that the breach of the peace was continuing, or show facts from which a renewal of the breach was to be apprehended, and as little as possible should be left to inference." Ib.

"These are positive rules of law, in order to prevent surprise on the plaintiff at the trial by the defendant then assigning various reasons and causes for imprisoning the plaintiff, of which he had no notice, and which consequently, he could not be prepared to meet at the trial on a plea of not guilty on fair

and equal terms with respect to the evidence and proof of facts." (Ib., 536, 537.)

A striking instance of the application of this rule is afforded by the case of *Brooks v. Ashburn et al.*, 9 Ga., 297, which was an action of trespass on the case for killing a slave, to which the defendants filed the plea of the general issue and sought to justify themselves thereunder by showing that they were acting as patrol when the slave was killed; they relied upon the act of 1770, which declared that "if any person shall be, at any time, sued for putting in execution any of the powers contained in the act, such person shall and may plead the general issue, and give the special matter and this act in evidence"; but this was not allowed by the court for two reasons: because this was a common action of trespass; the defendant were not sued for putting in execution the powers contained in the act of 1770, and could only avail themselves of the proof under a special plea of justification. This, the court ruled, was requisite under the ninth section of our judiciary act of 1799, which required the defence to be plainly, fully and distinctly set forth.

The plea in the case before us comes substantially up to these requirements. It sets forth that the plaintiff was at the time one of the defendant's servants, who, with others, had custody of the goods stolen on the vessel; that he and his associates could alone have been guilty of the theft, and particularizes each and all the circumstances that gave the defendant reasonable and probable grounds to suspect the guilt of this party and to cause his arrest, imprisonment and detention, and it avers that he was not detained in custody an unreasonable length of time. We hold this a good plea in justification of the conduct of the defendant, and it gave him the right to open and conclude the argument of the case to the jury.

2. In every case of tort, if the defendant was authorized by law to do the act complained of, he may plead the same as a justification: by such plea he admits the act to be done, and shall be entitled to all the privileges of one holding the affirmative of the issue. Code, § 3051. Among these privileges, and perhaps the most important of all of them, is that of opening and concluding the argument of the case to the jury. This privilege was denied him because, as it was said, the plea was not filed until the plaintiff had made out his case and closed his evidence. This objection is fully met and answered by this court in *Ransom v. Christian*, 56 Ga., 354.

3. It is claimed, moreover, that the plea is defective, in that it does not admit all that is charged against the defendant in the declaration; it does not, of course, admit, as was insisted that it should admit, that the imprisonment was wrongful and unlawful; that, instead of being a plea of justification, would have amounted to a confession of judgment to the plaintiff. All that the defendant was required to admit by its plea was the imprisonment and the manner thereof as charged in plaintiff's declaration. (49 Ga., 491.) * * *

Judgment reversed.

for def.

146 Mo. 539

CAPURO v. BUILDERS' INS. CO.

39 Cal., 123. [1870.]

TEMPLE, J., delivered the opinion of the Court:

This action is brought upon a policy of insurance, and the answer, after denying most of the allegations of the complaint, sets up four distinct charges of fraud, but does not charge the plaintiff with having caused the property to have been burned. On the trial, evidence was introduced by the defendant, which, as is claimed by defendant's counsel, tends to prove this fact. The evidence had no necessary or obvious tendency to establish such a charge, and may well have been permitted to come in without objection from plaintiff on that ground.

The Court, at request of defendant, and against the objection of plaintiff, instructed the jury, among other matters, in substance, that "if the plaintiff was in any way instrumental in causing the buildings to be burned, they should find for the defendant."

It is claimed that the instruction was erroneous; that no such issue was made by the pleadings.

The rule is, undoubtedly, as stated by appellant, that when a party relies upon fraud, either to support his cause of action or in defense, he must set up the facts which constitute the fraud. (Kent v. Snyder, 30 Cal., 666.)

It follows, as a necessary consequence of that proposition, that he can prove only those facts which he has set up. Of course, he is not required, by the rule, to allege with minuteness all the particulars and circumstances which constitute the evidence of

an action for malicious prosecution, however, the malice is a traversable allegation

the alleged fraud, but he must make the charge with sufficient distinctness to enable his adversary to come prepared with his evidence upon the general questions of fraud which will be raised.

*The fraud
is a true
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In this case, the question whether plaintiff caused the building to be burned, was not one of the issues made by the pleadings, and it was, therefore, error to instruct the jury that they could find against the plaintiff on that ground. The denial that the plaintiff had given a correct account of how the fire originated, even if it authorized evidence to show that the fire commenced in the inside of the building, instead of on the outside, as plaintiff had reported, gave no intimation to the plaintiff that he was charged with having started the fire himself.

Order reversed and a new trial ordered.*

for plain.

JOHNSON v. OSWALD.

38 Minn., 550. [1888.]

GILFILLAN, C. J.: This action was for conversion of personal property. The complaint alleges, generally, without referring in any way to the means by which he acquired title, that the chattel was the personal property of the plaintiff, and that he was in possession of it, and that the defendants caused it to be wrongfully taken from him. The answer is a general denial. The defendants offered to prove in substance that they, owning the chattel, were induced to sell to one Larson, from whom plaintiff claims to derive his title, by his (Larson's) false and fraudulent representations, and that upon discovering the fraud they rescinded the sale, and retook the chattel. There was already in the case evidence sufficient to go to the jury that plaintiff was not a *bona fide* purchaser of Larson's title. The court below excluded the evidence so offered.

The question raised is, can a defendant in an action for conversion, where the complaint contains only the simple allegation of title in plaintiff, prove under a general denial that the sale under which plaintiff claims title was void so as to pass no title

*Accord: Nichols v. Stevens, 123 Mo. 56, overruling earlier decisions.

by reason of fraud? The general rule is that "anything that tends to controvert directly the allegations in the complaint may be shown under the general denial." *Bond v. Corbett*, 2 Minn., 248, (Gil. 209.) Upon this rule it is held that in an action in replevin or for conversion a denial of the simple allegation of plaintiff's title will admit proof of title in defendant or a third person—*Caldwell v. Bruggerman*, 4 Minn., 70, (Gil. 190); *Jones v. Rahilly*, 16 Minn., 320, (Gil. 283); *McClelland v. Nichols*, 24 Minn., 176; *Robinson v. Frost*, 14 Barb., 536; *Davis v. Hoppock*, 6 Duer, 254; *Emerson v. Thompson*, 18 N. W. Rep. 503—for such proof directly controverts the allegation of plaintiff's title in the complaint. In the case of a sheriff, defendant, who seeks to justify his taking under process, on the claim that the sale to plaintiff was in fraud of the creditors of the person against whom the process runs, it has been held that a general denial of plaintiff's title is not sufficient. *Frisbee v. Langworthy*, 11 Wis., 375. This rule in this state, in the case of an officer justifying under process is stated in *Kenney v. Goergen*, 36 Minn., 190 (31 N. W. Rep., 210), to be that under the denial of plaintiff's title, and the allegation of title in the person against whom the process runs, he may, without specially pleading it, show fraud as to creditors in the sale by such person to plaintiff. There is some reason for requiring from the officer in such a case somewhat fuller pleading than from the defendant in a case like this. A sale in fraud of creditors is valid and effectual, and passes the title as between the parties. Only creditors who are defrauded by it can avoid it, and there is some reason for requiring one who seeks to avoid it to put himself in the place of a defrauded creditor. But in a case like this, if the facts be as defendant sought to prove them, the sale was void, and Larson got no title. As between the parties to the sale and to the action, it remained in defendant, unless plaintiff is a *bona fide* purchaser. A general denial puts in issue only the facts alleged in the complaint. Thus, if this complaint, instead of alleging plaintiff's title, had alleged the facts through which it was derived, as had it alleged the sale by defendant to Larson, and title derived by plaintiff from him, a general denial would enable defendant only to disprove those facts, but not to prove other facts to vary their legal effect. In such case the fraud could not have been proved without pleading it. The case would then have been analogous to *Finley v. Quirk*, 9 Minn., 194 (Gil. 179), in which a denial of

On strict analysis, the defence here is "new matter" i.e. affirmative; but the departure from the strict theory of pleading is due to the fact that title is treated

the sale of a horse was held to raise an issue only on the sale in point of fact, and did not justify evidence that it was made on Sunday, so as to be illegal. Under the denial in that case the defendant might have followed any line of evidence that would have disproved the sale in point of fact. So, under a denial of the pleadable fact of title, the defendant may introduce any evidence that will disprove such alleged fact. In many cases it might put a defendant to great disadvantage if, when the complaint alleges only the fact of title, without disclosing by what means plaintiff claims to have acquired it, defendant must anticipate plaintiff's evidence as to the source of title, and plead expressly facts to do away with the effect of it.

on a case? this, there no facts to deny. Title is a legal conclusion and cannot be confessed and avoided

It was error to exclude the evidence offered, and there must be a new trial.

for def.

Order reversed.

RICHTMEYER v. REMSEN.

38 N. Y., 206. [1868.]

Action to recover of the defendant, sheriff of Kings County, the amount of an execution against one Searle, issued out of the Supreme Court against the body of the judgment debtor, and delivered to the defendant for collection. The defendant arrested Searle, and duly admitted him to the liberties of the jail of Kings county. Searle, after being so admitted, escaped therefrom to the city of New York, and while so absent therefrom, this action was commenced. The defendant, in his answer, alleged that he had admitted Searle to the liberties of the jail, and that Searle, after his escape therefrom, voluntarily returned thereto before the commencement of the action. At the close of the plaintiff's case, the defendant moved for a nonsuit, upon the grounds, first, that the judgment-roll failed to show that the execution against the body of Searle was authorized; second, that it appeared, from the evidence, that Searle was detained off from the limits by the fraud and connivance of the plaintiff. The motion was denied, and the defendant's counsel excepted. The defendant's counsel then offered to prove that Searle would have returned to the jail limits before the commencement of the action had he not been prevented from so doing by the fraudulent acts

of the plaintiff's agents. This evidence was objected to and rejected, upon the ground that no such defense was set up in the answer, and the defendant's counsel excepted. The defendant's counsel moved to amend the answer by alleging the above facts. The motion was denied, and the defendant's counsel excepted. The defendant's counsel excepted generally to the charge to the jury. The jury found a verdict for the plaintiff, and ordered the exceptions to be first heard at the General Term. The exceptions were heard, and judgment for the plaintiff ordered upon the verdict, from which judgment the defendant appealed to this court.

GROVER, J.: The judgment record in the action of the plaintiff against Searle showed that one Johnson had a cause of action against the former for the conversion of personal property; that Johnson assigned such cause of action to the plaintiff, who commenced the action thereon as assignee against Searle, and recovered the judgment upon which the execution was issued. The ground of objection to the record was, that the cause of action was not assignable. There are two answers to this: First, the objection, if available, could only be taken in the action against Searle. The recovery of the judgment in that case is conclusive upon the right of the plaintiff thereto upon the parties in this action. Second, the cause of action thereon was assignable, and the assignee could maintain an action thereon in his own name. (*Haight v. Hoyt*, 19 N. Y., 464.) A recovery of judgment for the conversion of personal property authorizes an execution against the person of the defendant. (*Wessen v. Chamberlin*, 3 N. Y., 331.) The only remaining question in this case is, whether the defense, that Searle would have returned to and upon the liberties of the jail before the commencement of the action, had he not been prevented by the fraud of the plaintiff, was inadmissible under the answer, no such ground of defense having been alleged therein. The escape in the present case was negligent. In such cases, recaption before suit brought is a defense, and if such recaption is prevented by the fraud of the plaintiff or his agent, that, also, would constitute a defense to the action. A voluntary return of the debtor into custody before suit brought, is equivalent to and constitutes a recaption by the sheriff. There is no dispute as to those rules of law. The question is, whether these grounds of defense must be set up in the answer. The code (§ 249) provides that the answer must con-

tain, first, a general or specific denial of each material allegation of the complaint controverted by the defendant, etc.; second, a statement of any new matter constituting a defense, etc. The question then is, whether the defense offered consisted of new matter, or whether it merely disproved any of the material allegations of the complaint. All that the plaintiff must allege and prove, to maintain his action, is the recovery of the judgment, the issuing and delivery of the execution to the sheriff, the capture of the debtor by the sheriff upon the execution, and the escape from custody before suit brought against the sheriff therefor. We have seen that the sheriff may defend the action by proving a recaption of the defendant before suit brought, or facts legally excusing him from making such recaption. Proof of such facts do not controvert any allegation of the complaint. It is, therefore, new matter constituting a defense to the action, and, under the Code, is inadmissible, unless set up in the answer. The court, therefore, correctly held that the proof offered was inadmissible under the answer. The motion of the defendant, made upon the trial for leave to amend the answer, was addressed to the discretion of the court, and its exercise cannot be reversed by this court. The answer does not contain a general denial, and, therefore, the question does not arise whether the provision of the Revised Statutes, authorizing public officers, under the plea of the general issue, to give any defense in evidence, is repealed by the Code. There was no legal error committed in excluding the defense in this case.

Judgment affirmed.

SPARLING v. CONWAY.

75 Mo., 510. [1882.]

HOUGH, J.: This was an action for malicious prosecution. The answer was a general denial, and the defense relied upon at the trial was, that the defendant acted in good faith upon the advice of competent counsel. There was a verdict and judgment for the defendant, which was affirmed by the court of appeals. *malicious prosecution*

The plaintiff contends that the defense stated should have been pleaded in order to be made available by the defendant. We are of a different opinion. The testimony offered and re-

allegations that the prosecution was malicious and without probable cause are material traversable allegations

ence that received on this subject was admissible to disprove the allegation of malice contained in the petition and sought to be established by the plaintiff, and if the defendant had set it forth in his answer, he would only have pleaded his evidence. * * *

Judgment affirmed.

for def.

LANGTON v. HAGERTY.

35 Wis., 150. [1871.]

under. Action for slander. The complaint states five counts or causes of action, charging the speaking of the same words, substantially, but at different times, and in the presence and hearing of different persons. The introductory averments and the innuendoes are the same in each. Hence, a perusal of one count will show the structure of the whole complaint. The first cause of action is as follows: "That on or about the 12th day of October, 1872, at the city of Green Bay, in said Brown county, the defendant, wilfully and maliciously designing and intending to injure and degrade this plaintiff in his character, and to bring plaintiff into public infamy and disgrace, wilfully and maliciously spoke, published and declared of and concerning this plaintiff, in the presence and hearing of one N. L. Barber and divers other persons, the false, scandalous and defamatory words following, to-wit: 'He (meaning the plaintiff) murdered the man (meaning one Michael Nehill), and stole all of his money from him, and I saw him do it,' meaning, intending and charging thereby, that this plaintiff had been guilty of the crimes of murder and larceny; that plaintiff was thereby greatly injured in his good name, fame and character, to his damage three thousand dollars."

Each count is separately answered; but, except the reference in each to the number of the count which it purports to answer, the answers are alike. Each contains a general denial of the allegations of the count to which it responds, and, in addition thereto, the following averments: "And for a further answer to the plaintiff's (first) alleged cause of action, the defendant avers that before the speaking of the words, 'he murdered the man,' complained of, to-wit, on or about the 7th day of Decem-

ber, the truth of the words or their base defamatory, must be pleaded affirmatively. Where the words are not necessarily defamatory, their

ber, 1868, at the city of Green Bay, Brown county, in this state, the plaintiff above named did shoot and kill one Michael Nehill, and whatever was said by the defendant in relation to the killing of the said Michael Nehill as aforesaid, was said to the plaintiff personally, believing the same to be true, and without any malice towards the plaintiff or design to do him injury in his good name, fame, credit or otherwise." The whole answer concludes with a notice applicable to each particular answer, which is as follows: "All of which above facts the defendant will give in evidence on the trial of this action in mitigation of any damage the said plaintiff may by law be entitled to recover therein."

* * *

The jury found for the plaintiff, and assessed his damages at \$500. A motion to set aside the verdict and for a new trial was denied by the court, and judgment was duly entered for the plaintiff pursuant to the verdict.

The defendant appealed to this court.

LYON, J.: * * * Under the pleadings it was not a question for the jury whether the killing of Nehill was a justifiable or a felonious homicide. The defendant did not aver in his answer the truth of the words spoken by him; and, failing to do so, he is precluded, by well-settled rules of law, from proving that they were true. He is, therefore, in precisely the same position as though he had expressly admitted in his answer that such killing is not murder. Further, we held in *Wilson v. Noonan*, that extrinsic facts upon which the defendant relies to mitigate the damages, must be stated in the answer, or they will not be available to him. The answer does not aver that the killing of Nehill, if not murder, was manslaughter. Under the pleadings, all that the court could do was to submit it to the jury to say from the evidence whether, in view of all the circumstances, the defendant could honestly have believed, and whether he did believe, when he spoke the words, that the plaintiff had been guilty of the crimes charged against him. The court so instructed the jury in substance and effect, and properly refused to submit to them the question of the character of the homicide, whether justifiable or criminal.

A very considerable portion of the charge to the jury was in strict accordance with the rules of law above stated, and that portion requires no further notice. * * *

Judgment affirmed.

for plan.

BARR v. POST.

56 Neb., 698. [1898.]

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RAGAN, C.: Prior to September, 1893, William Barr owned a brick block in the city of Lincoln. In the upper story of this block were a number of lodging rooms. Barr employed Mrs. Martha A. Post to attend to these rooms, and keep them in order. She was intrusted with the keys to the various lodging rooms. For some reason, her services became unsatisfactory to Barr, and he discharged her. She, however, refused to surrender to Barr, on his demand, the keys for the various lodging rooms. On the 6th day of September of said year, Barr attempted to take his keys out of the hands of Mrs. Post. This, however, it seems, he failed to accomplish. Mrs. Post brought the present action to the district court of Lancaster county, against Barr, to recover damages for an alleged assault and battery inflicted upon her by Barr at the time he attempted to take from her possession the lodging keys. She had judgment, and Barr has brought the same here for review on error.

1. On the trial, the district court refused to instruct the jury, at the request of Barr, that he had the right to take possession of these keys from Mrs. Post, provided, in doing so, he did not use any more force than was actually necessary for that purpose, nor thereby commit a breach of the peace. This action of the court, it is insisted, was erroneous. The ruling of the court involves the right of a citizen, without recourse to law, to seize and take possession of his personal property wrongfully in the possession of another, provided in doing so, he does not commit a breach of the peace, nor use any greater force than is actually necessary for the purpose of recaption. It seems that this right of recaption of personal property exists. (Mussey v. Scott, 32 Vt., 84; Cross v. Marston, 44 Am. Dec., 353; Manning v. Brown, 47 Md., 506; Stearns v. Sampson, 8 Am. Rep., 442; Sterling v. Warden, 51 N. H., 217; Hite v. Long, 18 Am. Dec., 719.) But the record here does not present for decision the question whether it does. Barr's answer to the charge of assault and battery was a general denial, and, under this issue, evidence which tended to justify the assault and battery was inadmissible.

(Levi v. Brooks, 121 Mass., 501; Cooper v. McKenna, 124 Mass., 284.) The court, therefore, did not err in refusing the instructions asked. * * *

for plain-
Judgment affirmed.

KELLOGG v. SCHUERMAN.

18 Wash., 293. [1897.]

SCOTT, C. J.: This action was brought to recover damages for malicious prosecution. The appellant Christian Schuerman made complaint before a justice of the peace, charging the respondent and one Pratley with burglary in entering appellants' dwelling house. A warrant was issued, and the respondent and Pratley were arrested. Pratley was discharged upon a motion of the prosecuting attorney, and the justice of the peace discharged respondent, who thereafter brought this action and recovered damages in the sum of \$1,500; whereupon this appeal was taken.

*malicious
prosecution*

It is first claimed that the court erred in admitting in evidence the complaint and warrant upon which the respondent was arrested; but there is no merit in this contention, for the defendants admitted the proceedings before the magistrate. ***

Another point made, which it might be well to notice, is the alleged error of the court in not allowing the appellants to prove what was said by certain detectives to the prosecuting attorney, in their presence, upon their statement of what they claimed to be the facts relating to the burglary; it being argued that this proof was admissible for the purpose of showing probable cause. The respondent contends that it was not admissible, for the reason that the defendants had not alleged probable cause for instituting the prosecution in their answer. But, under the weight of authority, we are of the opinion that they were entitled to show this under a general denial. *Trodden v. Deekard, 45 Ind., 572; Rost v. Harris, 12 Abb. Prac., 446; Bruley v. Rose, 57 Iowa, 651 (11 N. W., 629); Folger v. Washburn, 137 Mass., 60.*

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It is also contended by the respondent that the ruling was harmless, because the jury in certain special findings found that the Schuermans acted maliciously, that no burglary had been

committed or attempted, and that such remarks were based upon their intentional false statements. Of course, what may have been said by the officers upon their fabricated statements could have been no justification for the prosecution. Nor was the question of probable cause involved at all if the Schuermans, knowing no crime had been attempted by the plaintiff, had conspired to get him convicted upon a false charge. But we are not prepared to say that all the statements of the officers sought to be proved were based upon what Schuerman and his wife related as the facts. They at all times maintained the charge to be true, and whatever facts existed independently of their statements would have a legitimate bearing to support such contention. Reversed, and remanded for a new trial.

_____ for def.

NICHOLS v. WINFREY.

79 Mo., 544. [1883.]

PHILLIPS, C.: This action was begun by Josephine Steinbeck, as the widow of James Steinbeck, deceased, for the malicious, wrongful, and unjustifiable killing of her said husband in Chariton county on the 17th day of July, 1876. The plaintiff has since intermarried with W. H. Nichols. The answer contained a general denial, and then pleaded that the killing was done in the necessary defence of defendant's person, and in the defence of his house, then occupied by defendant, after being assaulted therein by deceased. The venue of the cause was transferred, at plaintiff's instance, to Livingston county, where, on trial before a jury, the plaintiff recovered judgment for \$2,500, from which the defendant has appealed to this court. The controlling features of the evidence, as also the instructions to be reviewed will appear in their proper connection in the course of this opinion. * * *

III. The defendant complains of the fourth instruction conceded to the plaintiff, in which the jury were told "that before they can find for the defendant on the ground of self-defense, it devolves upon him to establish, by a preponderance of the testimony, that, at the time he shot and killed Steinbeck, Winfrey had reasonable cause to apprehend a design on the part

of Steinbeck to do him some great personal injury, and had also reasonable cause to apprehend immediate danger of such design being accomplished."

It is unnecessary to the decision of the propriety of this instruction, as applied to the facts of this case, to pass on the question as to whether the burden of proof in this character of action rests throughout and to the same extent on the plaintiff, as it does on the prosecution in a criminal case. It may be affirmed that the prosecutor, under the statute for the recovery of damages, is not held to the establishment of the defendant's guilt beyond a reasonable doubt. He is only required to make out his case by a preponderance of the evidence to the satisfaction of the jury.

The allegation of the petition is that the defendant, "with force and arms, violently, maliciously, unlawfully, and wrongfully, without any just cause, did shoot the said James Steinbeck." The answer denied generally the allegations of the petition, and then in the form of new matter pleaded that the act was done in self-defense and in defense of defendant's house, in which he was unjustifiably being assaulted by the deceased. This apparently new matter, however, was in legal effect embraced in the general denial, and would have been admissible in evidence thereunder. These matters, too, were covered by the averments of the petition. To maintain the issues on the plaintiff's part she could not have stopped in her evidence by merely proving that defendant shot and killed her husband; for by the terms of the statute under which she sought to recover, the killing must have been wrongful, and the allegations of the petition were that the killing was malicious, wrongful, and without just cause. * * *

Here, by virtue of the statute the malice or wrongfulness of the killing was essential to recovery, hence there were true and proper allegations of the same by a general denial. This is not a good case, says Hinton

Judgment reversed.

for def.

WILSON v. C. & S. RY. CO.

51 S. C., 79. [1897.]

GARY, A. J.: This action was commenced on the 26th of April, 1895, and was tried before his honor, Judge D. A. Towns, end, at the November, 1896, term of the court for Charleston county. The jury rendered a verdict in favor of the plaintiff

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for \$690.50. The defendant has appealed to this court on exceptions which, together with the complaint, answer, and charge of the presiding judge, will be set out in the report of the case. The third exception was abandoned. The exceptions will not be considered seriatim, as they raise practically but three questions, which will be hereinafter stated.

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was over
mission
evidence

The first question raised by the exceptions is: Was there error on the part of the presiding judge in excluding testimony offered in behalf of the defendant for the purpose of showing that the injury was caused by the negligence of a fellow servant, "on the ground that it referred to the defense of 'co-employee,' which could not be raised under the pleadings?" The complaint alleges negligence in the following particulars, to-wit: (1) That the yard-master of said company, who is charged with the direction and control of the movement of all switch engines and the making up of trains within the said yard limits of the defendant, was, at the time of the said accident, carelessly and negligently absent from his post. (2) That the hostler and switchman in control of the switch engine to which the baggage car was attached carelessly and negligently uncoupled it from the tender, while moving at a rapid and dangerous speed down the main line, on which the plaintiff's car was. (3) That there was no brakeman or other attendant on or in charge of the said baggage car, as was customary in the making up of trains. The "case" shows that the following took place while Mr. C. S. Gadsden, a witness for the defendant, was being examined by defendant's attorney, to-wit: "Q. Something was said about the yard-master. Is it his duty to be present at the making up of trains? A. He may or may not, as he sees proper. Q. Under whose control are all these people? (Question objected to on the ground that it referred to the defense of co-employee, which could not be raised, under the pleadings. Objection sustained. Ruling excepted to.)" Not only was the testimony which the defendant offered to introduce admissible on the ground that it was responsive to the allegations of the complaint that the yard-master was "charged with the direction and control of the movement of all switch engines and the making up of trains within the said yard limits of the defendant," but it was also competent for the purpose of showing a failure of negligence on the part of the defendant, by establishing the fact that the injury was caused by the negligence of a fellow servant. § 671, Pom. Rem., contains

the following: “ * * * Evidence which is in its nature affirmative is often confounded with defenses which are essentially affirmative, and in avoidance of the plaintiff’s cause of action, and is therefore mistakenly regarded as new matter, requiring to be specially pleaded, although its effect upon the issues is strictly negative, and it is entirely admissible under an answer of denial. In other words, in order that evidence may be proved under a denial, it need not be, in its nature, negative. Affirmative evidence may often be used to contradict an allegation of the complaint, and may, therefore, be proved to maintain the negative issue raised by the defendant’s denial. One or two familiar examples will sufficiently illustrate the propositions. In certain actions, property in the plaintiff, in respect of the goods, which are the subject matter of the controversy, is an essential element of his claim. His complaint, therefore, avers property in himself. The allegation is material, and is, of course, put in issue by the general or specific denial. To maintain this issue on his part the plaintiff may give evidence tending to show that he is the absolute owner, or has the requisite qualified property. The defendant may controvert this fact in two modes. He may simply contradict and destroy the effect of the plaintiff’s proof, and in this purely negative manner procure, if possible, a decision in his own favor upon this issue. The result would be a denial of the plaintiff’s recovery by his failure to maintain the averment of his pleadings; but the jury or court would not be called upon to find that the property was in any other person. The decision would simply be that the plaintiff had not shown it to be in himself. On the other hand, the defendant, not attempting directly to deny the testimony of the plaintiff’s witnesses, and to overpower its effect by directly contradictory proof, may introduce evidence tending to show that the property in the goods is, in fact, in a third person. This evidence, if convincing, would defeat the plaintiff’s recovery. It would be affirmative in its direct nature, but its ultimate effect in the trial of the issue raised by the answer would be to deny the truth of the plaintiff’s averment. Such evidence, although immediately affirmative, would still, for the purpose of determining the issue presented by the pleadings, be negative. * * * ”

Section 675 of the same author contains the following, to-wit: “In actions for injuries to person or property, alleged to have resulted from the defendant’s negligence, he may prove, under

a general denial, that the wrong was caused by the negligence of third persons, not agents of the defendant, and for whom he is not responsible. * * *

In the case of *Sheehan v. Prosser*, 55 Mo. App., 569, Mr. Justice Biggs, in delivering the opinion of the court, said: "The defense that the plaintiff was injured through the negligence of a fellow servant was available to the defendant without having been specially pleaded. Proof of that fact necessarily disproved the averment that the plaintiff was injured through the negligence of the defendant."

This view is sustained by *Express Co. v. Darnell*, 31 Ind., 20. The authorities are, however, conflicting, as will be seen by reference to the case of *Conlin v. Railroad Co.*, 36 Cal., 404, which sustains a contrary doctrine. The reason why testimony is admissible, under a general denial, to prove that the injury was caused by the negligence of a fellow servant is because its tendency is to show that there was no negligence whatever on the part of the defendant. On the other hand, the reason why it is necessary to set forth in the answer the defense of contributory negligence on the part of the plaintiff is because testimony showing such contributory negligence does not disprove the allegations of the complaint that the injury was caused by the negligence of the defendant. The defendant, by setting up in his answer the defense of contributory negligence on the part of the plaintiff, does not attempt to escape liability by showing a failure of negligence on his part, but because the plaintiff has done that which prevents a recovery against him, although he (the defendant) may have been guilty of negligence. Such facts would constitute an affirmative defense, of which the defendant could not get the benefit, unless it was set up in the answer. The exceptions raising the first question are sustained. * * *

*Judgment reversed.**

**Valliant, J. (in Allen v. Transit Co., 183 Mo. 411):*

In the brief for respondent it is contended that the statements in the answer amount to a confession of the plaintiff's right to recover and that the only question left open is as to the amount of damages. The idea advanced is that the statements in the plea of contributory negligence assume that the arrangement or plan of the car was a dangerous contrivance and, therefore, the defendants were guilty of negligence in putting it into public service. It would seem on reason that any plea of contributory negligence must be a plea of confession and avoidance. If the facts stated in the plea only go to show that it was the plaintiff's own negligence and nothing more that caused the acci-

JOHNSON v. MILLER.

47 Ind., 376. [1874.]

WORDEN, J.: Action by the appellee against the appellants. The defendants were Margaret J. Johnson, James Johnson, David Fessler, John Little, Sr., and Sarah J. Hobbs, all of whom join in this appeal.

The complaint alleges, in substance, that one William Hobbs was the equitable owner of a parcel of land described, the legal title to which was in Joseph P. Ring; that Ring, at the request of Hobbs, conveyed the land to the defendant Margaret J. Johnson; and to secure a part of the purchase money the said Margaret J. Johnson, together with Fessler and Little, executed to Ring a promissory note, a copy of which is set out, and that Ring, by the direction of the owner of the note (Hobbs, we suppose,) assigned the note to the plaintiff, which remains due and unpaid.

It is alleged that Sarah J. Hobbs, as the widow of William Hobbs, claims an interest in the land, hence she is made a party, and required to answer. Prayer for judgment on the note against the makers thereof, and that Mrs. Hobbs be enjoined from setting up or asserting any claim to the land.

The defendants all answered, Mrs. Hobbs setting up a claim to one-third of the land as the widow of her deceased husband, William Hobbs, and Mrs. Johnson setting up a breach of the covenants in her deed, by reason of the interest of Mrs. Hobbs in the land, but averring a readiness to pay whatever might be due on the note upon receiving a conveyance of that interest.

dent those facts could be proven under the general denial, because if it was the plaintiff's negligence only, it was in no part defendant's negligence. Under a general denial the defendant may prove any fact which shows that the plaintiff never had any cause of action. But where an affirmative defense is offered it logically carries the idea that a cause of action once existed, but has ceased because of the facts pleaded in the answer or that a cause of action would have arisen out of the facts set out in the petition but for the additional contemporaneous facts pleaded in the answer. Perhaps under the provision of our code (sec. 626, R. S. 1899), authorizing a party to plead alternatively, it would be proper for a defendant in his answer to deny the cause of action and yet say that because of certain other facts if the plaintiff ever had a cause of action it has ceased, or that he would have had a cause of action but for the facts stated in the answer.

We need not further notice the pleadings, though error is assigned upon some rulings on demurrers, because the counsel for the appellants say that the third error assigned really presents their case, and we agree with the counsel in that respect.

The third error is assigned upon the overruling of the appellant's motion for a new trial.

Upon issue joined, the cause was tried by the court, who found for the plaintiff the amount remaining due on the note against the makers, and that Mrs. Hobbs had no interest in the property, and rendered judgment for the recovery of the money, and that Mrs. Hobbs be forever enjoined from setting up any claim to the land.

One of the reasons assigned for a new trial was the admission of the note sued upon in evidence.

The ground of this objection was, that Mrs. Johnson, the principal in the note, was a married woman, and therefore could not make a valid note. It is a sufficient answer to this objection to say, that her coverture was not pleaded either by Mrs. Johnson or her sureties, Little and Fessler. Coverture is a special defence that must be pleaded, and evidence of it can not be given under a general denial. Had it been pleaded, we do not see how it could have been available to discharge Little and Fessler from their obligation. * * *

Reversed (on other grounds.)

SCHWARZ v. OPPOLD.

74 N. Y. 307. [1878.]

RAPALLO, J.: The question whether the verdict was against the weight of the evidence cannot be considered on this appeal. The General Term, having reversed the order at Special Term granting a new trial, must have been of opinion that the verdict was not against the weight of the evidence. That question the General Term had power to decide, and its determination thereon is final. The only points before us are those which arise on the exceptions taken at the trial.

The exception mainly relied upon was to the admission of the evidence of the defendant Wilhelm Oppold to the effect that the

words "with interest" which appear at the end of the note given in evidence were not there when he signed it. The objection taken was that no such defense was pleaded.

The complaint set forth a note payable on demand with interest. The answer of the maker, Wilhelm Oppold, contained a general denial. The note put in evidence purported to be payable with interest as alleged in the complaint. It was clearly competent for the defendant under his general denial to controvert this proof by showing that the note had been altered since its execution by adding the words "with interest." This alteration, which was established by the finding of the jury, clearly destroyed the effect of the note as evidence, and precluded any recovery thereon in the absence of sufficient explanation of the alteration. * * *

Judgment affirmed.

SCOTT v. MORSE.

54 Ia. 732. [1880.]

The petition of plaintiff alleges in substance that in the forepart of the year 1878, as a member of the firm of Montgomery & Scott, attorneys at law, the plaintiff, at the request of defendants, rendered professional services to them about the preparation of a petition for rehearing in a case entitled Crouse v. Morse, pending in the supreme court, which services were worth \$300; that afterwards, on the fourteenth day of April, 1878, the firm of Montgomery & Scott was dissolved, and the said claim was assigned to plaintiff and became his property. The plaintiff demands judgment for \$300 and interest. The defendants filed an answer denying all the allegations of the petition. The cause was tried to a jury and a verdict was returned for the plaintiff for \$134.37. The motion for a new trial was overruled, and judgment was entered upon the verdict. The defendants appeal.

DAY, J. It is claimed by the defendants that B. F. Montgomery, a member of the firm of Montgomery & Scott, agreed that his firm should render for defendants the services in question without charge; and it is insisted that there is no contradiction of the testimony of Montgomery that he agreed on behalf of his firm that the services should be rendered without compen-

sation. It is claimed that upon this branch of the case the verdict is oposed to the uncontradicted testimony, and therefore is not supported by the evidence. The only pleading interposed by the defendants is a general denial of all the allegations of the petition. This denial simply puts in issue the fact of the rendition of the services, their value, and that the claim therefor has been assigned to the plaintiff. If the defendants intended to rely upon the fact that there was an agreement that the services in question should be rendered without compensation, such defence should have been specially pleaded. "Any defence which admits the facts of the adverse pleading, but by some other matter seeks to avoid their legal effect, must be specially pleaded." Code, § 2718.

The case falls fully within the principle of *Parker v. Hendrie*, 3 Iowa, 263. In that case, as in this, evidence was introduced and instructions were given on an issue not tendered by the pleadings. A verdict was returned for the plaintiff, which the defendant moved to set aside on the ground that it was against the law and evidence. The motion was overruled. On the question presented the following language is employed: "The testimony as to the agreement to return the machine, and the instructions based thereon, relate to an issue not made, or attempted to be made, by the pleadings. The testimony was, therefore, immaterial. To justify the granting of a new trial, on the ground that the verdict is against the weight of the evidence, such want of evidence must relate to a material issue, legitimately made by the pleadings. It is the issues of fact made by the pleadings which the jury are to determine, and not others or different ones." This case we regard as decisive of the question now involved.

*Affirmed.**

*DEVENS, J. (in *Phipps v. Mahon*, 141 Mass. 471):

"The defendant relied upon an alleged agreement between himself and the plaintiff, by which the latter was to do the work sued for, under a special contract, for a sum certain, which the plaintiff had already received. It was for the defendant to offer some evidence to rebut the inference to be deduced from the facts proved by the plaintiff. He did not seek to avoid the contract alleged by plaintiff, or the effect of it, but to disprove its existence. While in form his evidence was affirmative, the use he sought to make of it was strictly negative, and was for the purpose only of rebutting the plaintiff's proposition as deduced from the evidence offered by him. The burden was still

FINLEY v. QUIRK.

9 Minn. 194. [1864.]

WILSON, J. Action for breach of warranty of a horse. The suit was originally commenced in justice's court, and after judgment removed by appeal into the district court of Rice County. In the complaint the plaintiff "charged that the defendant in sale of a horse to him warranted the horse to be sound, perfect in every respect, and true, gentle, and willing to work—all which representations he knew to be false." Defendant in his answer "denied the warranty and all knowledge of any defects, and alleged that at the time of sale the horse was sound, gentle, and willing to work." Verdict was rendered in the district court for the plaintiff, and the defendant thereupon moved the court for a new trial. The motion was denied, and the defendant appealed to this court.

The grounds for a new trial urged in this court are: First, error in law occurring at the trial and excepted to; second, that the evidence was not sufficient to justify the verdict. These objections we will examine in the inverse order of their statement. * * * Third, in the examination of the plaintiff's witnesses, it appeared that on Saturday the parties met, and the plaintiff agreed to purchase and the defendant to sell the horse at a price agreed upon. The plaintiff then paid \$5 to "bind the bargain," agreeing to pay the balance of the purchase money on the next day, when the horse was to be delivered. The horse was delivered, and the purchase money paid, on the next day (the Sabbath), in pursuance of the contract.

When the plaintiff closed his evidence and rested his case the defendant moved the court for judgment on the ground that the evidence showed that the bargain was consummated on Sunday. The motion was denied, and defendant excepted. This is the principal point in the case; we think the only one relied

upon the plaintiff to prove the contract alleged by him, upon all the evidence in the case. If we suppose this evidence to be equally balanced, he could not recover, as he has failed to prove that which is essential. In an action for labor and services rendered, where the plaintiff seeks to recover what they are reasonably worth, he cannot do so if the whole evidence leaves it in doubt whether they were not gratuitously rendered."

upon by defendant's counsel. The sale of a horse consummated on the Sabbath is void, and an action on the warranty in such sale will not lie. Comp. Stat. 730, § 19; *Smith v. Wilcox*, 24 N. Y. 353; *Northrup v. Foot*, 14 Wend. 248; *Brimhall v. Van Campen*, 8 Minn. (13); *Finney v. Callendar*, *id* (41). It is claimed by the counsel for the plaintiff that this point was not in issue, and therefore that the evidence touching it was irrelevant. It is doubtless true that evidence must correspond with the allegations, and *be confined to the point in issue*, and if in the examination of witnesses facts come out which, had they been alleged, would furnish ground of relief or defense, such facts must be disregarded unless they are warranted by the allegations of the pleadings. *Stuart v. Merchants' and Farmers' Bank*, 19 Johns. 505; *Field v. Mayor of N. Y.*, 6 N. Y. 179.

The defendant insists that the answer does not admit a *valid* contract. We will for the present take this for granted, and examine the case in that point of view. The case therefore turns on the question whether it was necessary to specifically aver in the answer the facts establishing this defense.

We think this must be answered in the affirmative, whether it is viewed as a question of principle or by the light of authority. Our statute provides, that "the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language, etc.; that the answer must contain (1) a denial of *each allegation of the complaint controverted*, and (2) a statement of any *new matter constituting a defense*," etc.; that "an issue of fact arises upon a *material allegation* of the complaint controverted by the answer," etc.

It will be observed that the plaintiff can only allege *facts*, and that in the answer the defendant *must* either deny *the facts alleged* in the complaint, or allege new matter by way of defense or avoidance. And when the answer consists merely of a denial, it is quite clear that the plaintiff will only be required to prove, and the defendant only permitted to controvert, the facts *alleged* in the complaint. *Allen v. Patterson*, 7 N. Y. 478; *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray, 544. In the language of Mr. Justice Selden, in case of *Benedict v. Seymour*, 6 How. Pr. R. 298, "A general traverse under the code authorized the introduction of no evidence on the part of the defendant, except *such as tends directly to disprove some fact alleged in the complaint*." If the question of the legality of the sale can be raised by a

denial of any allegation of the complaint, it must be by a denial of the sale, for the day or time of the sale is not a material or traversable fact. 1 Chitty Pl. 613-14, 621; 1 Barb. Ch. Pr. 136; 2 Saund. 219; Steph. Pl. 244-45; Newman v. Otto, 4 Sandf. 688.

We have above seen that an issue of fact arises only upon a material *allegation* of the complaint controverted by the answer, and in this case the legality of the sale is not alleged, and of course is not and could not be denied or controverted. Nor is such an allegation necessary, for it is a well established rule of pleading that it is not necessary to allege what the law will presume, and everything is presumed to have been legally done until the contrary is proved. 1 Chitty Pl. 221; Maynard v. Tolcott, 11 Barb. 569; Steph. Pl. 353-54; 1 Van Sant. Pl. 330. But even if it was admitted that the defendant might by a mere denial raise an issue on a fact not specifically alleged, yet the *legality* of the sale is not a traversable fact but a conclusion or inference of law. 1 Chitty Pl. 213-14, 540; Ensign v. Sherman, 13 How. Pr. R. 35; Mann v. Morewood, 5 Sandf. 564; Lienan v. Lincoln, 2 Duer, 670; Lawrence v. Wright, id. 673; Moss v. Riddle, 5 Craneh, 351; Major v. The State, 8 Blackf. 72. And a traverse or denial can only be of matter of fact and not of conclusion of law. 1 Chitty Pl. 612; Steph. Pl. 191; 1 Barb. Ch. Pr. 133; Comp. Stat. 541; Moss v. Riddle, and Major v. The State, above.

The *true object* of pleading is and always has been to apprise the adverse party of the *ground* of action or defense, in order that he may be prepared to contest it, and may not be taken by surprise. 1 Chitty Pl. 478, 213; Mann v. Morewood, 5 Sandf. 564; Story Eq. §§ 255-57, 852; 1 Barb. Ch. Pr. 137. The rules of pleading will generally be found to be ancillary to or the logical sequence of this cardinal principle or rule. Facts are only to be stated in pleadings, and not arguments, inference, or matters of law. 1 Chitty Pl. 214; Story Eq. Pl. 852; Lienan v. Lincoln, 2 Duer, 670; Lawrence v. Wright, id. 673; because the statement of *facts* is necessary to apprise the adverse party of the *ground* of action or defense. Mr. Justice Buller well says that it is "one of the first principles of pleading that there is only occasion to state facts, which must be done for the purpose of informing the court whose duty it is to declare the law arising upon those facts, and of apprising the opposite party of what is meant to be proved in order to give him an opportunity to answer or traverse it." Doug. 159; 1 Chitty Pl. 213. With the same

object in view our legislature provides that every ground of action or defense should be stated "in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended."

The answer in this case gives no intimation of the *nature* of the defense relied upon, or that any defense is to be interposed except by disproof of the facts alleged in the complaint. Such a defense is not admissible under an answer merely by way of denial. It is not in principle distinguishable from any other which admits a contract in point of fact, that is alleged to be void in point of law; as, for instance, usury, gaming, stock jobbing, coverture, fraud, etc. The facts tending to establish any such defense are, in their nature, "new matter constituting a defense," or, to use an expression more common in the law, and having the same meaning, "matter in confession and avoidance." *Catlin v. Gunter*, 11 N. Y. 368; *Tidd. Pr.* 643, 685; *Fay v. Grimstead*, 10 Barb. 321; *Gould v. Horner*, 12 Barb. 602; *Watson v. Bailey*, 2 Duer, 509. The *principles* of pleading in courts of law and equity, and the express provisions of our statute, require that such matter should be specifically averred in the answer. See cases last above cited. *Gouverneur v. Elmendorf*, 5 Johns. Ch. 79; *Stuart v. Merchants' & Farmers' Bank*, 19 Johns, 496; *Richards v. Worthley*, 5 Wis. 73; *Steph. Pl.* 213; *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray, 541; *Bradford v. Tinkham*, 6 Gray, 494; 1 *Chitty Pl.* 526; *id.* 213. Thus *only* can the answer apprise the plaintiff of the ground of defense, which we have seen is the true object of pleading. This general rule, and the necessity for its observance, are well illustrated and impressed by the case before us. It is true that at common law, in *assumpsit* on the general issue, matters of defense of this character may be given in evidence.

But these rulings are not applicable as precedents in this case; because—*first*, the general issue cannot be pleaded under our statute; *second*, the rules of pleading under the general issue at common law have always been admitted to be at variance with the *principles* and *logic* of that system of pleading (*Steph. Pl.* 158; 1 *Chitty Pl.* 526, 473, 478-9, 213); and *third*, by the rules of Hil. T. 4 W. 4, in England "*this abuse has been corrected*," and matters of defense of this character must now be *specially* pleaded (see said rules); *fourth*, at common law (irrespective of the rules of H. T.), where there is a contract in point of fact,

as in this case, the defendant has the option either to plead the general issue, or to plead specially any matter showing it void or voidable in point of law (Tidd Pr. 643; 1 Chitty Pl. 526; id. 213-14), which is a recognition of the principle, by us held in this case, that such special matter is not by way of denial, but by way of avoidance of the matters alleged in the complaint.* For that which is only a traverse or denial of the allegations of the complaint can never be *specially* pleaded at common law. Steph. Pl. 202-3; Bank of Auburn v. Weed, 19 Johns. 300; 1 Chit. Pl. 527; Tidd Pr. 653-4.

We hold, therefore—*first*, that an answer, merely by way of denial, raises an issue only on the *facts* alleged in the complaint; *second*, that the denial of the sale of the horse in this case only raised an issue on the sale in *point of fact*, and not on the question of the *legality* of such sale; *third*, that all matters in confession and avoidance, showing the contract sued upon to be either void or voidable in point of law, must be affirmatively pleaded.

We have thus far treated the case as if the answer denied each allegation of the complaint. This, we think, cannot be admitted. The only facts controverted are—*first*, the warranty; *second*, the breach of warranty. These facts, only, the plaintiff was required to prove. A sale of the horse was admitted, and whether that sale was void or valid was not a question in the case.

The decision of the court below was, therefore, correct in any point of view.

Judgment affirmed.

PASTENE v. PARDINI.

135 Cal. 431. [1902.]

HENSHAW, J. This was an action upon a promissory note. The complaint contained the usual averments. It charged that Luigi Pardini, "for a valuable consideration, made, executed, and delivered to plaintiff a promissory note," etc. It also averred nonpayment of the principal sum and interest, and that the whole was due and unpaid. The answer was a denial that "Luigi Pardini, for a valuable consideration or otherwise, made,

*But see Thayer, Preliminary Treatise on Evidence, p. 232.

executed, and delivered to plaintiff, a promissory note for the sum of twenty-five hundred dollars or any other sum." The next denial of the answer was: "Denies that Luigi Pardini has not paid the alleged note set forth in plaintiff's complaint; denies that the said Luigi Pardini has not paid the interest on said alleged note set forth in plaintiff's complaint; denies that said alleged note or the interest is still unpaid." Following these denials was a cross complaint to the effect that the sum of \$800 was loaned to plaintiff by Luigi Pardini.

At the opening of the trial, plaintiff's attorneys stated what he believed to be the issues involved, and that the sole issue was the execution of the note, stating, further, his conviction that the cross complaint was not proper in the action. The court, in passing upon the suggestion of the attorney, held that the cross complaint could not be set up in the action, and settled the pleadings by declaring: "The only issue under the pleadings is whether the deceased, Pardini, executed the note." Appellants contend that by the ruling of the court above quoted he was deprived of his defences to the note of nondelivery, want of consideration, and payment. * * *

As to the second and third contentions, that the defendant was deprived of his defences of lack of consideration and payment, it is sufficient to say that such defences are affirmative defences to be pleaded, and this, defendant did not do. He contented himself in his answer with a naked denial of the averments of the complaint, and this, as has been repeatedly held in this and in other code states, is not sufficient to raise either of these issues. "A promissory note imports a consideration, and therefore it is not necessary that a consideration should be specially alleged. If there was no consideration, the defendant should have filed an answer setting up a want of it as a defence to the action." *Winters v. Rush*, 34 Cal. 136. The introduction of the unpaid note by the plaintiff was sufficient evidence, if evidence was necessary, in support of his negative allegation of nonpayment (*Brennan v. Brennan*, 122 Cal. 441, [55 Pac. 124, 68 Am. St. Rep. 46]); but payment is an affirmative defence, which must be pleaded. (*Melone v. Ruffino*, 129 Cal. 514, [62 Pac. 93, 79 Am. St. Rep. 127]). Therefore, defendant has no just cause for complaint that he was excluded by the ruling of the court from offering evidence upon defences which he had not raised.

There was sufficient evidence to support the findings of the court upon all the issues, and, as defendant was not deprived of any defence to which he was entitled, the judgment is affirmed.

JOHNSTON v. NORTHWESTERN INS. CO.

94 Wis. 117. [1896.]

NEWMAN, J. (after stating the facts): At the commencement of the trial there was a demurrer *ore tenus* to the complaint, on the ground that it did not state a cause of action. The policy contained an agreement that the insured would "use due diligence, precaution, and care in the use, and for the safety, health, and preservation, of said live stock, and in case of sickness or accident would promptly summon to his aid the best veterinary surgeon to be had in the vicinity." A failure to do so was to avoid the policy. The demurrer was based principally upon the failure of the complaint to allege affirmatively the performance of this agreement. This was not a defect in the complaint. The performance of this agreement was a condition subsequent. It did not go to the original validity of the policy, but was a stipulation to be performed afterwards. Its breach is a defense merely. It is no necessary part of the plaintiff's case, in the first instance, either by pleading or proof, to show that he has performed it. If the defendant relied upon failure to perform this stipulation of the policy, it should be set up as a defense. It could make it available in no other way. *Redman v. Insurance Co.*, 49 Wis. 431, (4 N. W. 591); *Schobacher v. Insurance Co.*, 59 Wis. 86, (17 N. W. 969); *Benedix v. Insurance Co.*, 78 Wis. 77, (47 N. W. 176).

OSCANYAN v. ARMS COMPANY.

103 U. S. 261. [1880.]

Mr. Justice FIELD delivered the opinion of the court.

This is an action to recover the sum of \$136,000, alleged to be due to the plaintiff upon a contract with the defendant, as commissions on the sales of fire-arms to the Turkish government, effected through his influence. The defendant pleads the general

issue. At the time the transactions occurred, out of which this action has arisen, the plaintiff was consul-general of the Ottoman government at the port of New York. The defendant is a corporation, created under the laws of Connecticut. The action was originally commenced in the Supreme Court of New York, and on motion of the defendant, was removed to the Circuit Court of the United States. When it was called for trial, and the jury was impanelled, one of the plaintiff's counsel, as preliminary to the introduction of testimony, stated to the court and jury the issues in the case, and the facts which they proposed to prove. From such statement it appeared that the sales for which commissions were claimed by the plaintiff were made whilst he was an officer of the Turkish government, and through the influence which he exerted upon its agent sent to this country to examine and report in regard to the purchase of arms. The particulars of the services rendered will be more fully mentioned hereafter. It is sufficient now to say that the defendant, considering that the facts which the plaintiff proposed to prove showed that the contract was void as being corrupt in itself and prohibited by morality and public policy, upon which no recovery could be had, moved the court to direct the jury to render a verdict in its favor. The court thereupon inquired of the plaintiff's counsel if they claimed or admitted that the statements which had been made were true, to which they replied in the affirmative. Argument was then had upon the motion, after which the court directed the jury to find a verdict for the defendant, which was accordingly done. Judgment being entered upon it, the case was brought to this court for review. The reversal of the judgment is sought for alleged errors of the court below in three particulars:

1st, In directing a verdict for the defendant upon the opening statement of the plaintiff's counsel;

2d, In holding that the question of the illegality of the contract could be considered in the case, the same not having been specially pleaded; and,

3d, In adjudging that the contract set forth in the opening statement was illegal and void.

Each of these grounds will be carefully examined.

1. Several reasons are presented against the power of the court to direct a verdict upon the statement of the facts which the plaintiff proposed to prove, that might be more properly

urged against its exercise in particular cases. The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced. The question in either case must be whether the facts upon which it is called to instruct the jury be clearly established. If a doubt exists as to the statement of counsel, the court will withhold its directions, as where the evidence is conflicting, and leave the matter to the determination of the jury. * * *

2. The position of the plaintiff that the illegality of the contract in suit cannot be noticed, because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worthy of serious consideration had it not been earnestly pressed upon our attention by learned counsel. The theory upon which the action proceeds is that the plaintiff has a contract, valid in law, for certain services. Whatever shows the invalidity of the contract, shows that in fact no such contract as alleged ever existed. The general denial under the Code of Procedure of New York, or the general issue at common law, is, therefore sustained by proof of the invalidity of the transaction which is designated in the complaint or declaration as a contract.

Whilst, however, at the common law, under the general issue in assumpsit, it was always admissible to give in evidence any matter which showed that the plaintiff never had a valid cause of action, in practice many other matters were allowed under that plea, such as went to the discharge of the original cause of action, and showed that none subsisted at the commencement of the suit,—such as payment, release, accord and satisfaction, and a former recovery, and excuses for non-performance of the contract; and also that it had become impossible or illegal to perform it. 1 Chitty, Pleading, 493; *Craig v. The State of Missouri*, 4 Pet. 410-426; *Edson v. Weston*, 7 Cow. (N. Y.) 278; *Young v. Rummell*, 2 Hill (N. Y.), 478. It followed that there were many surprises at the trial by defences which the plaintiff was not prepared to meet. The English courts, under the authority of an act of Parliament passed in the reign of William IV., adopted rules which, to some extent, corrected the evils arising from this practice of allowing defences under the general issue which did not go directly to the validity of the original cause of action. And the Code of Procedure of New York did away entirely with the practice in that State, and required parties relying upon anything which, admitting the original existence of the

cause of action, went to show its discharge, such as a release or payment, or other matter,—to plead it specially, in order that the plaintiff might be apprised of the grounds of defence to the action. We do not understand that the code makes any other change in the matters admissible under the general denial.

But if we are mistaken in this view of the system of procedure adopted in New York, and of the defences admissible according to it under a general denial in an action upon a contract, our conclusion would not be changed in the present case. Here the action is upon a contract which, according to the view of the judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. Assuming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law. History furnishes instances of robbery, arson, and other crimes committed for hire. If, after receiving a pardon, or suffering the punishment imposed upon him, the culprit should sue the instigator of the crime for the promised reward,—if we may suppose that audacity could go so far,—the court would not hesitate a moment in dismissing his case and sending him from its presence, whatever might be the character of the defence. It would not be restrained by defects of pleading, nor, indeed, could it be by the defendant's waiver, if we may suppose that in such a matter it would be offered. What is so obvious in a case of such aggravated criminality as the one supposed, is equally true in all cases where the services for which compensation is claimed are forbidden by law, or condemned by public decency or morality.

This doctrine was applied in *Coppell v. Hall*, reported in 7th Wallace. In that case Coppell was the acting British consul in New Orleans, and during the late civil war entered into a contract with one Hall, by which the latter agreed to furnish him with sundry bales of cotton, which he was to cause to be protected from seizure by our forces and transported to New Orleans, and there disposed of to the best advantage, he to receive one-third of the profits for his compensation. For breach of this

contract he sued Hall, who set up that the contract was against public policy and void, and also a reconventional demand or counter-claim for damages for a breach of the contract by Coppel. On the trial, the court below, among other things, instructed the jury that if the contract was illegal, the illegality had been waived by the reconventional demand of the defendant; but this court said, speaking through Mr. Justice Swayne, that the instruction "was founded upon a misconception of the law." "In such cases," he added, "there can be no waiver. The defence is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo non oritur actio*, is limited by no such qualification." The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." See also *Holman v. Johnson*, 1 Cowp. 341.

Approving of the doctrine so well expressed in this citation, our conclusion is, that the second position of the plaintiff is not well taken. * * *

*Judgment affirmed.**

BUTTERMERE v. HAYES.

5 Mees. & W. 456. [1839.]

PARKE, B. The question which the court reserved for consideration was, whether, in an action on an executory contract concerning an interest in land, the plaintiff was required, on a plea of non assumpsit, to prove a memorandum in writing as

**Sprague v. Rooney*, 104 Mo. 349, accord; compare *St. L., A. & M. Ass'n v. Delano*, 108 Mo. 217.

required by the 4th section of the Statute of Frauds. Upon this point, depending upon the construction of the New Rules, a considerable difference of opinion has prevailed in the profession and the Court have therefore been desirous to give the question full consideration.

There is no doubt that before the new rules of pleading, such proof would have been necessary. But the 1st and 3rd of these rules, in actions of assumpsit, have limited the operation of the plea of non assumpsit. Allegations in the declaration are now admitted by that plea, which formerly it required the plaintiff to prove; and defences are now excluded by the new rule, which formerly might have been proved under it. Before the New Rules, under the plea of non assumpsit, the plaintiff was required to prove all the material averments in the declaration, and not merely the making of the contract declared on; and the defendant was at liberty not only to disprove all the allegations of the declaration, but to show by evidence consistent with them, that the contract, though actually broken, was void in law, and even to prove defences, such as release, or accord and satisfaction, which showed that though a cause of action had once subsisted, it was put an end to before the commencement of the suit. The object of the New Rules was clearly to remove this inconvenience, and with that view the first and third of these in assumpsit restrict the general issue, by limiting the operation by which it formerly put in issue all the averments in the declaration in actions on special contracts, and by confining it to a denial of one of them only, namely, of the contract declared on, and by excluding all defences which might formerly have been made by disproving all the other allegations of the declaration, or by proof of matter which showed that the contract was void, or that the cause of action had ceased before the commencement of the suit. In the present case the question in effect is, whether the writing required by the 4th section of the Statute of Frauds, and which formerly was a necessary part of the plaintiff's proof on the issue of non assumpsit, is so still; and the Court are of the opinion that it is. Under the former system of pleading, the plaintiff was required to prove a writing within the Statute of Frauds. This must have been in order to support some allegation of his declaration, and there is no allegation, except that of the making of the contract, which it supports. This allegation is still put in issue by the plea of non assumpsit; and there is

nothing in the New Rules which alters the evidence by which the plaintiff was required to support it.

It was contended on behalf of the plaintiff, that the want of a writing to satisfy the Statute of Frauds was a matter which was required to be specially pleaded under the 3rd rule, as showing the contract to be void or voidable in point of law; but we think that the meaning of this part of the rule is to require matter to be specially pleaded which would have been the subject of proof on the part of the defendant, such as usury, fraud, &c.; and not to exempt the plaintiff from proving anything which he would formerly have been required to prove. We therefore think that the writing required by the 4th section must be proved on the general issue by the plaintiff.*

This Court has already intimated its opinion, that the plaintiff must prove a note in writing, required by the 17th section, on the plea of the general issue; *Johnson v. Dodgson*,† *Elliott v. Thomas*;‡ and we have no difficulty in saying that in the other cases in which the Statute of Frauds requires a writing, as, for instance, in cases of demises for three years, a writing must be proved, not merely on a special traverse of the demise, but where the denial of the demise is included in the general issue.

The rule, therefore, which has been obtained in this case, to enter a verdict for the defendant on the first count, must be made absolute.

Rule absolute.

†2 M. & W. 657. ‡3 M. & W. 170.

*MAULE, J., in *Leroux v. Brown*, 12 C. B. 801 (1852). The 4th section of the Statute of Frauds enacts that "no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." Now, this is an action brought upon a contract which was not to be performed within the space of one year from the making thereof, and there is no memorandum or note thereof in writing signed by the defendant or any lawfully authorized agent. The case, therefore, plainly falls within the distinct words of the statute. It is said that the 4th section is not applicable to this case, because the contract was made in France. This particular section does not in terms say that no such contract as before stated shall be of any force; it says, *no action shall be brought upon it*. In their literal sense, these words mean that no action shall be brought upon such an agreement in any

MATTHEWS v. MATTHEWS.

154 N. Y. 288. [1897.]

ANDREWS, C. J. Subsequently to the decision of the former appeal in this case (133 N. Y. 681, 31 N. E. 519), the case of Crane v. Powell, 139 N. Y. 379, 34 N. E. 911, came before the court, in which the controverted question was whether, in an action on an oral contract within the statute of frauds, where the complaint did not disclose the nature of the contract, whether oral or written, it was necessary for the defendant to plead the statute in order to avail himself of the objection. The question was distinctly decided in that case, and it was held that the statute was a defence, and, unless pleaded, was not available to the defendant to defeat the action. The case must be regarded as settling the law of this state upon a question upon which the

York rule:
i. e. Frauds
to be pleaded
negatively

court in which the British legislature has power to direct what shall and what shall not be done; in terms, therefore, it applies to something which is to take place where the law of England prevails. But we have been pressed with cases which it is said have decided that the words "no action shall be brought" in the 4th section are equivalent to the words, "no contract shall be allowed to be good," which are found in another part of the statute. Suppose it had been so held, as a general and universal proposition, still I apprehend it would not be a legitimate mode of construing the 4th section, to substitute the equivalent words for those actually used. What we have to construe, is, not the equivalent words, but the words we find there. If the substituted words import the same thing, the substitution is unnecessary and idle; and, if those words are susceptible of a different construction from those actually used, that is a reason for dealing with the latter only. It may be, that, for some purposes, the words used in the 4th and 17th sections may be equivalent; but they clearly are not so in the case now before us; for, there is nothing to prevent this contract from being enforced in a French court of law. Dealing with the words of the 4th section as we are bound to deal with all words that are plain and unambiguous, all we say, is, that they prohibit the courts of this country from enforcing a contract made under circumstances like the present,—just as we hold a contract incapable of being enforced, where it appears upon the record to have been made more than six years. It is parcel of the procedure, and not of the formality of the contract. None of the authorities which have been referred to seem to me to be at all at variance with the conclusion at which we have arrived.

courts of different jurisdictions have differed in opinion. This court regarded the rule adopted in *Crane v. Powell* as sound in principle, and as supported by the rule applied in analogous cases.

It is plain, upon the view that the statute of frauds does not make an oral contract within its terms illegal, but only voidable at the election of the party sought to be charged, that such election must be manifested in some affirmative way. The mere denial in the answer of the contract alleged in the complaint, when the character of the contract is not disclosed, is quite consistent with an intention to put in issue simply the fact whether any agreement was entered into, either oral or written. One of the rules established by the English judicature act, as amended in 1873 (38 & 39 Viet. c. 77, order 19, rule 23), ordained that, "where a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract, and not of its legality or its sufficiency in law, whether with reference to the statute of frauds or otherwise"; and in *Towle v. Topham*, 37 Law T. (N. S.) 309, Jessel, M. R., applied the rule to the pleadings in an equity case. The statutory rule enacted by the English judicature act was regarded by this court in *Crane v. Powell* as declaring the true rule, independently of the statute. The mere denial in the answer in the present case of the contract alleged in the complaint did not, therefore, raise any question under the statute of frauds, and it could not be raised by objection on the trial to the proof of the oral contract, for the very conclusive reason that the statute must be pleaded before the validity of the contract on that ground can be assailed. Regarding the agreement alleged and found in this case as one for the sale and conveyance to the plaintiff of the house and lot, and applying the rule established in *Crane v. Powell*, it is plain that it must be treated as a valid contract, and its breach by the original defendant (who has died since the last trial) as giving a right of action for damages, as if the contract had been written and not oral.

for plain.

SPRINGER v. KLEINSORGE.

83 Mo. 152. [1884.]

PHILIPS, C. This is an action to recover from the defendant the amount alleged to have been bid by him for certain real estate sold in the name of Nicholas Springer and others at public auction. The answer tendered the general issue, and further pleaded that at said sale false and fraudulent bidders, known as bybidders, through the connivance of plaintiff's testator, were present, and that false representations were then and there made by vendors, by reason of which defendant was misled into making a bid at said pretended sale.

On a trial before the court, without a jury, the court found the issues for the defendant, and dismissed the petition. From this judgment plaintiffs appealed to the St. Louis court of appeals, where the judgment of the circuit court was reversed. From this last judgment the defendant prosecutes this appeal.

1. The statute of frauds is invoked in argument by the defendant. The court of appeals held that "the statute of frauds is not in the case at all because it is not pleaded." We cannot assent to this proposition. The petition avers a contract of sale respecting real estate. It is not averred whether the contract is in writing or not. The presumption, however, in such cases is, that the contract is such as the law recognizes. If it appeared on the face of the petition that it was not in writing, duly executed, the petition would be demurrable. This fact not so appearing, the defendant, to avail himself of the statute of frauds, must raise the issue by answer. But it is not necessary that the answer should, in so many words, plead the statute *eo nomine*. "Where the defendant in his answer denies the contract, it is not necessary for him to insist upon the statute as a bar." *Wildbahn v. Robidoux*, 11 Mo. 660; *Hook v. Turner*, 22 Mo. 333-335. It is as fully raised by a general denial "as any other answer could raise it." *Wisnell v. Tefft*, 5 Kan. 263; *Bliss on Pl.*, 353; *Allen v. Richard*, *ante*, p. 55.

On such statute of the pleadings the plaintiff, as said by Ryland, J., in *Hook v. Turner*, *supra*, "must produce legal evidence of the existence of the agreement, which cannot be established by parol proof."* This logically results from the general

*But see Thayer, Cases on Evidence, 820, note.

denial authorized by the practice act. The general denial puts in issue every fact included within the allegations of the petition, which the plaintiff must prove in order to a recovery. *Northrup v. Miss V. Ins. Co.*, 47 Mo. 435-444. In the action of replevin and of ejectment, under a general denial, the defendant may show that the claim of plaintiff is fraudulent and bad, and thus avoid the plaintiff's title. *Greenway v. James*, 34 Mo. 328; *Bobb v. Woodward*, 42 Mo. 488; 25 Wis. 35-36; 3 Bibb 216. The answer in this case contains, first, a general denial of the allegation of the petition. It is true, it pleads other matters of special defence, but the new matter is in nowise inconsistent, in contemplation of the practice act, with a general denial. They can well exist together in point of fact and law. *Nelson v. Brodhack*, 44 Mo. 596.

This construction of the pleading in this case is in nowise in conflict with the cases of *Gardner v. Armstrong*, 31 Mo. 535; *Rabsuhl v. Lack*, 35 Mo. 316; and *Graff v. Foster*, 67 Mo. 512, cited by the court of appeals in support of its ruling. In the first case cited the court simply holds, that the petition was not demurrable for failing to recite that the contract was in writing. That was matter of defence to be raised by the answer. It does not say that the question would not be well raised, under our present practice act, by the general issue. So in the case in 35 Mo., the answer admitted the indebtedness without pleading the statute. And in *Graff v. Foster*, an examination will show that the answer did not deny the contract, but merely put in issue the indebtedness. To deny the indebtedness is no denial of the existence of the contract out of which the petition avers the indebtedness arose. *Engler v. Bate*, 19 Mo. 543.

Judgment (of the Court of Appeals) reversed.

for def.

BARKER v. WHEELER.

62 Neb. 150. [1901.]

SULLIVAN, J. Bert Glendore Wheeler sued the plaintiffs in error as sureties upon an official bond, and obtained judgment against them. The petition alleges that one James W. Eller was county judge of Douglas county during the term ending Janu-

ion on
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ary 3, 1894; that the defendants George E. Barker and William S. Rector were the sureties upon his official bond; that Eller in his official capacity received certain money belonging to the plaintiff, and converted the same to his own use. The answer admits that Eller was county judge, and that defendants were his sureties, but denies in general terms the other averments of the petition. The only assignment of error with which we have to deal calls in question a ruling of the trial court excluding evidence tending to show that Eller, while he was yet judge of the county court, paid the plaintiff's money to her duly constituted guardian. The correctness of this ruling depends upon whether, in actions of this kind, evidence of payment is admissible under a general denial. It is settled doctrine in this state, that, in actions to recover money claimed to be due upon ordinary contracts, the general denial is the Code equivalent of the common-law plea of nonassumpsit, and hence does not put the allegation of nonpayment in issue. Magenau v. Bell, 14 Neb. 7, (14 N. W. 664); Clark v. Mullen, 16 Neb. 481, (20 N. W. 642); Lamb v. Thompson, 31 Neb. 448, (48 N. W. 58); Lewis v. Lewis, 31 Neb. 528, (48 N. W. 267); Live-stock Co. v. May, 51 Neb. 474, (71 N. W. 67); Hudelson v. Bank, 51 Neb. 557, (71 N. W. 304). These cases recognize no distinction between payment according to the terms of the contract and payment after breach of the contract, and one of them, at least (Clark v. Mullen, 16 Neb. 481, 20 N. W. 642), is a direct adjudication to the effect that payment at the time the goods were sold and delivered, and before a cause of action arose, could not be shown unless specially pleaded. But neither this court nor any other, so far as we know, has ever held, in an action on an official bond or other bond of indemnity, that the plaintiff was, by a general denial, relieved of the necessity of proving the loss or injury out of which arose the right of action. The defendants did not by their bond become indebted to the plaintiff. They assumed no specific obligation to her which they were bound at all events to discharge, by payment or otherwise. Their promise, given to the county of Douglas, was to make good any loss that the public or individuals might sustain by reason of the official misconduct of Eller. This being so, it would be illogical—it would be inconsistent with reason and common sense—to hold that a general denial, like the plea of nonassumpsit, put in issue nothing but the execution of the bond. An offer to prove payment is not in

Difference in way of looking at
bonds: formerly imposed absolute
liability to be discharged subject

every case an implied admission that the plaintiff once had an actionable demand against the defendant; its purpose may be, as in this case, to prove that a right of action never existed. Eller received the money in question rightfully. His possession of it as county judge was lawful, and there is no presumption that he was guilty of official misconduct. The allegation of conversion was, therefore, a material one, and it was not admitted by the general denial. Payment was not new matter, within the meaning of section 99 of the Code of Civil Procedure, for it was offered, not to show the discharge of an obligation that once existed, but to show that the bond had not been forfeited, as alleged, that Eller had not been guilty of official misconduct, that the plaintiff had not been injured; in short, that one of the essential averments of the petition was not true. In *State v. Peterson* (Mo. Sup.), 39 S. W. 453, which was an action upon an official bond, the court, speaking by Macfarlane, J., said that "in cases in which nonpayment is a material fact necessary to constitute a cause of action, it must be alleged and proved as part of plaintiff's case, and defendant can controvert it, under a general denial, by proof that payment was made." Other cases to the same effect are *Manufacturing Co. v. Tinsley*, 75 Mo., 458, and *Knapp v. Roche*, 94 N. Y., 329. The case of *Hudelson v. Bank*, supra, does not at all support the position for which the plaintiff contends. It merely decides that, in an action by a mortgagee for possession of mortgaged chattels, an allegation of nonpayment of the mortgage debt is indispensable. The legal effect of a general denial was not determined, nor was there any occasion to consider the question, as the statute declares the effect of such a denial in actions of replevin.

The judgment heretofore rendered in this court is set aside, the judgment of the district court is reversed, and the cause remanded for further proceedings.

For def.
Reversed and remanded.

The allegation of the breach of a contract to pay money i.e. statement of non-payment, is not traversable. Payment is an affirmative defense in discharge. This is an anomalous rule.

LITTLE v. REID.

111 Mo., 242. [1897.]

enclosure
mortgage
BARCLAY, P. J. This action was begun April 19, 1895. The plaintiff is J. M. Little. The defendants are Jas. H. Reid, as administrator of the estate of Daniel Bentley, deceased, Matilda Bentley (the widow of Daniel), and Joseph Little. The objects of the action are to foreclose a mortgage or deed of trust conveying certain real estate, and to obtain a judgment for the debt thereby secured. The deed of trust in the nature of a mortgage, which is the foundation of the action, was executed by Daniel Bentley and his wife, Matilda, October 3, 1882, to secure a note to plaintiff for \$650, payable twelve months after date, with interest at eight percent per annum to be compounded annually. Joseph Little was named as trustee, with certain powers of sale in event of default. This deed of trust was properly recorded. The land conveyed thereby as security consisted of some ninety acres in Boone county.

June 8, 1892, Mr. Bentley died intestate. His widow remained in possession of the land; but no administration was had upon his estate until April 5, 1895, when the probate court ordered defendant Jas. H. Reid, to take charge as public administrator. The foregoing exhibits the special features of the petition, which in other respects states an ordinary case for the foreclosure of the mortgage. The trustee and the widow, who are defendants, filed no answer. The administrator defended. He admitted the death of Mr. Bentley and his own status as personal representative, but denied the other allegations of the petition. The answer also set up the following special defenses:

“And for his further answer, this defendant says that plaintiff is estopped from bringing or maintaining this suit for the reason that more than ten years have expired prior to the institution of this suit since the execution of the note and deed of trust described in plaintiff’s petition, and that the same are now more than ten years old and are therefore barred by the statute of limitations of the State of Missouri, which this defendant sets up and pleads as a special defense in bar of plaintiff’s recovery in this action. And this defendant would also plead and rely upon, as a special defense to the foreclosure of the deed of trust

described in plaintiff's petition, the act of the General Assembly of the State of Missouri, passed and approved February 18th, 1891." The reply to the answer is a general denial.

At the trial defendant offered to prove that the deceased, Mr. Bentley, had been in adverse, open, notorious and peaceable possession of the premises in controversy, claiming the same against the interest of everyone, including plaintiff, from 1872 until his death in 1892. The learned trial judge, however, rejected that offer and excluded all testimony thereunder. It will not be necessary to go into further particulars of the trial. It will suffice to say that the court ultimately found for plaintiff, decreed a foreclosure, adjudged the sum of \$1,729.75 to be due on the note secured, and directed the demand to be certified to the probate court for allowance of any residue that might remain due, after the foreclosure sale which was decreed. The defendant appealed from the decree, after certain motions and other steps in the circuit court.

Def. tried to prove he had been in adverse possession

The only question we shall touch at this time is whether or not this court has jurisdiction of this appeal. Counsel appear entirely willing to have the merits considered here. But it is part of our duty to observe the limitations on our authority, and hence to examine into the question just stated. *McGregor v. Pollard* (1895) 130 Mo. 334 (32 S. W. Rep. 640).

We discern no ground on which jurisdiction over this case can be maintained by this court. The only class of cases belonging here that might possibly be suggested as including the case at bar is the class "involving title to real estate." Const. 1875, art. 6, sec. 12. But it has been often declared that title is not involved in a mere suit to foreclose a mortgage. *State ex rel. v. Court of Appeals* (1877), 67 Mo. 199; *Pinnco v. Knox* (1881), 100 Ill. 471; *Bailey v. Winn* (1890), 101 Mo. 649 (12 S. W. Rep. 1045); *Barber Pav. Co. v. Hezel* (1897), 139 Mo. 228 (39 S. W. Rep. 781).

The defenses put forward by defendant in his answer only assert that the foreclosure is barred by the limitation law. The offer of defendant to show adverse title (as against the mortgage) was beyond the issues of the pleadings. The plaintiff objected to entering that foreign field, and the court sustained the objection. The rejected offer can not be properly held to have enlarged the paper issues in the case. The general denial in the answer did not raise an issue of title in a case of this sort. Nor could that

issue be projected into the cause at the trial, in the manner attempted, against the protest and objection of the plaintiff.

It is true that, in actions of ejectment, title by adverse possession may be shown under a general denial of the allegation of title in plaintiff. That rule must be accepted as settled by a line of decisions in this State. *Nelson v. Bradhack* (1869), 44 Mo. 596; *Bledsoe v. Simms* (1873), 53 Mo. 307; *Stocker v. Green* (1888), 94 Mo. 280 (7 S. W. Rep. 279). But the proposition established by those decisions gives no sanction to the wide extension of its application sought by the defendant here. Under the answer (of which a part has been above quoted) the deed of trust must be considered admitted. The present right to enforce it is disputed, owing to the lapse of time; but its original effect as a conveyance of the title is plainly conceded. Such is a fair and reasonable interpretation of the answer of the administrator. The other defendants admitted the plaintiff's entire contention by their default. In that state of the pleadings the offer of proof of an adverse title was clearly irrelevant. It was not admissible under the principles of pleading discussed in the group of precedents last cited, nor for any reason that has as yet been suggested.

In our judgment the Supreme Court has no jurisdiction of this appeal. It is therefore certified to the Kansas City Court of Appeals. MACFARLANE, ROBINSON and BRACE, J. J., concur.

_____ for plain.

Section 3. Equitable Defences.

J. R. v. M. P.* ✓

Jenkins Century Cases, 108. [1459.]

Several persons were in debt to A. B buys these debts from A, and upon this, B enters into an obligation of £1,000 to pay A £500 at a certain day; B sues A in Chancery to be discharged from his bond, because the debts assigned to him can only be released by A, and only be sued in A's name, being things in action; and so the bond was *given* without any valuable consid-

*For the full report of this case, see Y. B., 37 Henry VI. 13, and see also a translation by Professor Ames, *Cases Eq. Jur.* 1.

eration: a decree was made by the advice of the judges, that this bond of B's should be discharged.

*Equity act
in personam*

If after this decree, A sues B upon his bond in the court of Common Pleas, and B pleads this decree; the court will reject this plea; for the Common Law proceeds upon certain fixed and invariable rules; the Chancery proceeds at the discretion of a good man. A decree there binds a person to obedience, but does not at all operate upon the matter in question.

Buying of debts is maintenance at Common Law, and punishable by indictment or information; but it is not pleadable in bar of this obligation; for the condition of the obligation was to pay a sum of money, not for debts bought; and this buying is collateral to the condition.

A bond for the payment of a sum of money upon condition, in the case of simony; the simony may be pleaded against such bond by virtue of the 31 El. Cap. 1. So for usury by 13 El. Cap. 8. So against a bond *given* to the sheriff or gaoler contrary to the statute of 23 H. 6 Cap. 10. These statutes give averments in such cases; *but* there is no statute which gives such averment in the case of maintenance. The advice of the judges in the principal case was upon the examination of the matter in equity. At Common Law, in a suit upon an obligation with a condition to pay a sum of money, no collateral matter is pleadable to avoid it. He who has a decree in Chancery proceeds by attachment against the party against whom the decree was made.

VAN SYCKEL v. DALRYMPLE.

32 N. J. Eq., 233. [1880.]

The Vice-Chancellor (VAN FLEET): This suit is founded on a mortgage made by the defendant to one Henry Johnson, bearing date March 30th, 1872, and payable April 1st, 1873. Johnson sold the mortgaged premises to the defendant, and the mortgage was given in payment of part of the purchase money. The defence set up is: That the mortgage does not, in a material point, conform to the contract under which it was given. The defendant says that, at the time he made the purchase, he told Johnson he could not purchase if he was to be required to put the property in repair and also pay the principal of the mortgage to be

given, during Johnson's life, and that thereupon Johnson agreed that the mortgage should not be due and payable during his life, provided the defendant kept the interest paid up and put the property in repair and kept it so.

On the final hearing the defendant offered to show an oral contract substantially like that set up in his answer. His evidence was held to be inadmissible, and his defence unavailable, without a cross-bill seeking to reform the mortgage. Leave to file a cross-bill was not asked, nor was it intimated that, if further proceedings in the suit were temporarily delayed, a cross-bill would be filed. The answer imputes no fraud or wrong to Johnson in the preparation or execution of the mortgage. It does not charge that Johnson had the mortgage drawn, or was present at its execution. It is silent as to who procured the mortgage to be drawn, and it must therefore be presumed that it was drawn at the instance and according to the instructions, of the person who executed it. If the mortgage contains a mistake, it would seem to be pretty clear that the complainant is not responsible for it.

The defendant seeks to avail himself of this defence by answer alone. The question, it will be perceived, is not whether this court can, upon appropriate pleadings, reform the mortgage, but, can it, in the present condition of the pleadings, give effect to the alleged oral contract, so as to make the mortgage read entirely different from its written language? The law upon this subject is rudimental. Oral evidence is admissible to reform a written instrument, or to subvert or overthrow it entirely, but not to vary or alter it. The general rule may be thus expressed: When the parties to a contract have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of their engagements, it is conclusively presumed that every part of their contract was reduced to writing, and all oral evidence, therefore, of what was said during the negotiations of the contract, or at the time of its execution, must be excluded on the ground that the parties must have made the writing the only repository and memorial of the truth, and whatever is not found in the writings must be understood to have been waived and abandoned. A rule so elementary and familiar need not be vouched for by authorities. The following cases are cited merely to illustrate its application: *Chetwood v. Brittan*, 1 Gr. Ch. 448; *S. C.* 3 Gr. Ch. 336:

S. C. on appeal, 1 Hal. Ch. 628; Dewees v. Manhattan Insurance Company, 6 Vr. 372; Chubb v. Peckam, 2 Beas, 207; Huffman v. Hummer, 2 C. E. Gr. 269; French v. Griffin, 3 C. E. Gr. 280; Locander v. Lounsbury, 9 C. E. Gr. 420.

Even fraud in the consideration of a mortgage, which does not go the extent of completely overthrowing the instrument, can only be made available to the defendant in a foreclosure suit by cross-bill. (Miller v. Gregory, 1 C. E. Gr., 274; O'Brien v. Hulfish, 7 C. E. Gr., 471.)

The defendant's evidence is inadmissible, and the complainant is, consequently, entitled to a decree.

FORD v. DOUGLAS. ✓

5 Howard (U. S.), 113. [1846.]

Mr. Justice NELSON delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States, held in and for the Eastern District of the State of Louisiana.

The complainants below, the appellees here, filed their bill against Christopher Ford, the appellant, and Robertson, the marshal of the district, for the purpose of obtaining injunctions to stay proceedings upon the several judgments and executions, which Ford had recovered in the Circuit Court of the United States against one Stephen Douglas, as executor of J. S. Douglas, deceased.

The judgments amounted to some \$18,000, and the marshal had levied upon two plantations, and the slaves thereon, of which the testator, J. S. Douglas, had died seized and possessed.

The bill set forth that Stephen Douglas, against whom the judgments had been recovered, neither in his own right nor as executor of J. S. Douglas, deceased, had any title to or interest in the plantations and slaves which had been seized under and by virtue of the said executions; and that the same formed no part or portion of the succession in the hands of said executors to be administered. But that the whole of the said plantation and slaves, including the crops of cotton and all other things thereon, were the true and lawful property of the complainants;

that they were in the lawful possession of the same, and had been for a long time before the issuing of the executions and seizure complained of; and had acquired the said property, and the title thereto, at a probate sale of all the property belonging to the estate and succession of the said testator—which sale was lawfully made, and vested in the complainants a good and valid title. All which would appear by the *proces verbal* of the said adjudications, and the mortuary proceedings annexed to and forming a part of the bill.

An injunction was granted, in pursuance of the prayer of the bill, staying all proceedings on the judgments rendered in the three several suits, and also on the executions issued thereon against the property.

Christopher Ford, the adjudged creditor, in answer to the bill, denied the validity of the probate sales of the plantations and slaves to the complainants, and charged that they were effected, and the pretended title thereto acquired by fraud and covin between the executor, Stephen Douglas, and the executrix, the widow of the testator, and one of the complainants, for the purpose of hindering and defrauding the creditors of the estate; that in furtherance of this design, a large amount of simulated and fraudulent claims of the executor and executrix were presented against the succession, to-wit, \$53,000 and upwards, in favor of the former, and \$76,000 and upwards in favor of the latter, which were received and allowed by the Probate Court, without any vouchers or legal evidence of the genuineness of the debts against the estate; and these simulated and fraudulent claims were made the foundation of an application to the said Probate Court for an order to sell the two plantations, and slaves thereon, under which the widow and Archibald Douglas became the purchasers at the probate sale; that neither had paid any part of the purchase money to the executor or Probate Court; and which was the only title of the complainants to the property in question, upon which the defendant had caused the executions to be levied.

In confirmation of the fraud thus alleged in the probate sales in the parish of Madison and the State of Louisiana, the defendant further charges that the testator died seized and possessed, also, of a large plantation, and slaves and personal property therein situate in the County of Clairborne and State of Mississippi, inventoried at upwards of \$70,000, besides notes and ac-

counts to the amount of \$161,000 and upwards; that the said plantations and slaves were, on application of Stephen Douglas, the executor, to the Probate Court in that state, and an order for that purpose obtained, sold and purchased in by the widow and executrix for about the sum of \$40,000, and that the personal estate of \$161,000 and upwards, of notes and accounts, were not, and have not been, accounted for by the executor to the Court of Probate.

In short, according to the answer of the defendant, the estate and succession of the deceased debtor, inventoried at about the sum of \$300,000, and for aught that appears available to that amount, has been sold and transferred through the instrumentality and agency of family connections, under color of proceedings apparently in due form in the Probate Court, into the hands of the widow and a brother of the deceased, without adequate consideration, if consideration at all, and with intent to hinder delay and defraud the creditors of the estate, and particularly the defendant.

The complainants excepted to the answer filed by the defendant, because the matter and doings set forth therein could not in law be inquired into in the present suit, or proceedings instituted by the said complainants, and prayed that they might have the benefit of their injunction, and that it might be made perpetual.

And thereupon it was agreed that the case might be set down for argument on the matters of law arising on the bill and answer; and that if the judgment of the court in matters of law should be for the defendant, the complainants might join issue on the fact, and testimony be taken in the usual manner.

The court, after argument of counsel, decreed that the exception of the complainants to the defendant's answer was well taken, and gave leave to answer over, which was declined; and, therefore, the court adjudged and decreed that the injunction theretofore awarded in the case should be made perpetual; and it was further adjudged and decreed that complainants recover the costs of suit, without prejudice to the right of the defendant to any action he might think proper.

The decision of the court below, and the view which we have taken of the case here, do not involve the question whether the matters set forth in the answer sufficiently established the fact that a fraud had been committed by the complainants against

creditors, in the several sales and transfers of the property in question, through the instrumentality of the Probate Court, nor, as it respects the effect of the fraud, if established, upon the title derived under these sales. If the case depended upon the decision of these questions, we entertain little doubt as to the judgment that should be given.

The ground of decision below and of the argument here is that the complainants were not bound to answer the allegations of fraud against their title, in the aspect in which the case was presented to the court; that a title derived under a public sale, in due form of law, by the probate judge, protected them in the full and peaceable possession and enjoyment of the property until the conveyance was vacated and set aside by a direct proceeding instituted for that purpose; and that this step, on the part of the judgment creditors, was essential, upon the established law of the state of Louisiana, before he could subject the property to the satisfaction of his judgment.

We have, accordingly, looked into the law of that state on this subject, and find the principle contended for well-settled and uniformly applied by its courts in cases like the present. The judgment creditor is not permitted to treat a conveyance from the defendant in the judgment made by authentic act, or in pursuance of a judicial sale of the succession by a probate judge, as null and void, and to seize and sell the property which has thus passed to the vendee. The law requires that he should bring an action to set the alienation aside, and succeed in the same, before he can levy his execution. And so firmly settled and fixed is this principle in the jurisprudence of Louisiana, as a rule of property, and as administered in the courts of that state, that even if the sale and conveyance by authentic act, or in pursuance of a judicial sale, are confessedly fraudulent and void, still no title passes to a purchaser under the judgment and execution, not a creditor of the vendor, so as to enable him to attack the conveyance, and obtain possession of the property. In effect the sale, if permitted to take place, is null and void, and passes no title. (*Henry v. Hyde*, 5 *Martin* (N. S.), 633; *Yocum v. Bullitt*, 6 *Ibid.*, 234; *Peet v. Morgan*, 6 *Ibid.*, 137; *Childress v. Allen*, 3 *Louisiana*, 477; *Brunet v. Duvergis*, 5 *Ibid.*, 124; *Samory v. Hebrard et al.*, 17 *Ibid.*, 558.)

The case of *Yocum v. Bullitt et al.*, among many above referred to, is like the one before us.

The court there says: "The record shows that the slaves had been conveyed by the defendant in the execution by a sale under the private signature recorded in the office of the parish judge of St. Landry, where the sale was made. If the sale was fraudulent it must be regularly set aside by a suit instituted for that purpose; that it was not less a sale and binding upon third parties until declared null in an action which the law gives (*Curia Phil. Revocatoria*, n. 2); that the possession of the vendee was a legal one, until avoided in due course of law." The court further remarked that "The same point had been determined at the preceding term, in which it had been held that a conveyance alleged to be fraudulent could not be tested by the seizure of the property or estate belonging to the vendor, but an action must be brought to annul the conveyance."

The principle runs through all the cases in the books of reports in that state, and has its foundation in the Civil Code (art. 1965, 1973, 1984), and in the Code of Practice (Sec. 3, art. 298, 301, 604, 607), and in *Stein v. Gibbons & Irby* (16 Louisiana, 103). And from the course of decision on the subject, it is to be regarded not merely as a rule of practice, or mode of proceeding in the enforcement of civil rights, which would not be binding upon this court, but as a rule of property that effects the title and estate of the vendee, and cannot, therefore, be dispensed with without disturbing one of the securities upon which the rights of property depend. It gives strength and stability to its possession and enjoyment, by forbidding the violation of either, except upon legal proceedings properly instituted for the purpose. Neither can be disturbed, except by judgment of law. For this purpose the appropriate action is given, providing for the secession of all contracts, as well as for revoking all judgments when founded in fraud of the rights of creditors.

In this court, a bill filed on the equity side is the appropriate remedy to set aside the conveyance. In the present case a cross-bill should have been filed, setting forth the matters contained in the answer of the defendant. The vendees would then have had an opportunity to answer the allegations of fraud charged in the bill, and, if denied, the parties could have gone to their proofs, and the case disposed of on its merits.

It is said that in some of the Western States an answer like the one in question would be regarded by their courts in the nature of a cross-bill, upon which to found proceedings for the

purpose of setting aside the fraudulent conveyance. But the practice in this court is otherwise, and more in conformity with the established course of proceeding in a court of equity.

We are of opinion, therefore, that the appellant mistook his rights in attempting to raise the question of fraud in the probate sales in his answer to the injunction bill; and that, instead thereof, he should have filed a cross-bill, and have thus instituted a direct proceeding for the purpose of setting aside the sales and subjecting the property to his judgments and executions; and that in this respect, and to this extent, the decree of the court below was correct.

But on looking into the decree, we are apprehensive that it has been carried further than the assertion of the principle which we are disposed to uphold, and which may seriously embarrass the appellant in the pursuit of a remedy that is yet clearly open to him.

The injunction issued, on filing the bill of complainants, commanded the appellant to desist from all further proceedings on his three judgments, or on the executions issued against the property; and the court on the coming in of the answer, has decreed that the same be made perpetual. And, further, that the complainants recover costs of suit, without prejudice to the right of the defendant to any action he may think proper.

It is at least a matter of doubt, and might be of litigation hereafter, whether, upon the broad and absolute terms of the decree used in enjoining the proceedings, the party is not concluded from further proceedings against the property in question, founded upon these judgments and executions.

They must constitute the foundation of his right and title, upon filing a cross-bill, to any relief, that he may hereafter show himself entitled to. The saving clause may not be regarded as necessarily leaving a proceeding of this description open to him. A question might also be raised, whether the judgments are not so effectually enjoined, as to prevent their enforcement against the property of the judgment debtor not in controversy in this suit. At all events, we think it due to the appellant, and justice, looking at the nature and character of the transaction and proceeding as developed in the pleadings, that the case should be cleared of all doubts and dispute upon this point. We shall, therefore, reverse the decree, and remit the proceedings to the court below, with directions that all further proceedings on the three judg-

ments and executions be stayed, as it respects the property seized and in question, but that the appellant have liberty to file a cross-bill, and take such further proceedings thereon as he may be advised.

Decree reversed.

BECK v. BECK. ✓

43 N. J. Eq., 39. [1887.]

VAN FLEET, V. C.: This is a suit by a wife against her husband to compel him to account for the rents of certain real estate which she says he has collected as her agent. The parties were married in August, 1854. The complainant holds the legal title to the two pieces of real estate in the city of Newark. The first was conveyed to her in August, 1859, and is situate on Springfield avenue. The second was conveyed to her in November, 1877, and is situate on the corner of New and Plane streets. There are buildings on both tracts, which have been almost constantly occupied by tenants since the complainant obtained title. The defendant has collected all the rents, but has neither paid nor accounted to the complainant for them. The complainant, by her bill, says that she authorized the defendant to collect the rents, with the understanding that he should apply them to the payment of taxes and other necessary annual charges of the premises, and also in making such improvements on the premises as would inure to her benefit, and account to her from time to time for any balance which remained in his hands. The complainant revoked the defendant's agency in October, 1886, but he, notwithstanding, persisted in attempting to collect the rents, and because some of the tenants refused to pay rent to him he instituted legal proceedings to dispossess them. The complainant then brought this suit, asking that the defendant might be required to account for the rents he had already received, and also that he be restrained from making further collections, and from molesting or annoying her tenants. The defendant has answered, denying the complainant's right to an account. He says that he is the real owner of both tracts. His claim in this regard is put upon the ground of a resulting trust. He says that he made the contract of purchase for each tract, and subsequently paid the whole of the purchase

money with his own funds, his wife not contributing a penny. He likewise says that he caused the legal title to the lands to be made to his wife, but that he did so without either an agreement or purpose to make a gift to her, or a settlement upon her, and that the lands have always, since she obtained title, been treated and considered as belonging to him, she holding the legal title in trust for him. The defendant puts his right to the rents of the property on the corner of New and Plane streets on an additional ground. He says that property was sold by the city of Newark, to enforce an unpaid assessment made against it, for a term of 50 years from the 16th day of March, 1871, and that a legal title was subsequently made to the purchaser in execution of the sale, and that he (defendant) became invested with such title on the 15th of July, 1878, and thereby acquired a right to the possession and use of this part of the property in controversy superior to any which the complainant can claim. The defendant has also made these facts the basis of a cross-bill, in which he asks a decree declaring that the complainant holds the legal title to the lands in question in trust for him, and directing her to convey them to him.

This cross-bill is the subject of the present controversy. The complainant moves to strike it out both on the ground that it is useless and impertinent; useless, because, as her counsel contends, if the facts stated in the cross-bill were set up in the answer alone, and proved, they would constitute, under the answer, as complete and perfect a defence to the case made by the bill as can be made; impertinent, because the cross-bill seeks to thrust into the case a question entirely foreign to the matter put in litigation by the original bill.

There can be no doubt, I think, that a cross-bill which merely sets up matter which the defendant may make equally available and effectual as a defence by answer, is demurrable; for in such case the cross-bill is not only unnecessary, but useless. The only purpose it could serve in such case would be to incumber the record, and add to the expense of litigation. And it is also well settled that a defendant can only use a cross-bill against a complainant as a means of defence. It must, therefore, be confined to the matter put in litigation by the original bill, and cannot be used by a defendant as a means of obtaining relief against a complainant in respect to a cause of action distinct from and wholly unconnected with the complainant's cause of action. Carpenter

v. Gray, 37 N. J. Eq., 389; Kirkpatrick v. Corning, 39 N. J. Eq., 136; Krueger v. Ferry, 41 N. J. Eq., 432 (5 Atl. Rep., 452). The question presented for judgment must be decided by these rules.

So far as the defendant's defence rests on a legal title, it would seem to be entirely clear that he does not need the aid of a cross-bill, but that he may make it fully and effectually under his answer. The *gravamen* of the complainant's case is that the defendant has, as her agent, received the rents of certain real estate which she holds for her own use, and refused to pay them to her. The defendant denies the principal fact upon which this claim rests. He says that the complainant does not hold the legal title to a part of the real estate of which she claims the rent, but that he does. If he establishes this fact, he will show as perfect and as complete a defence as can be shown, and a decree of dismissal denying that the complainant is entitled to these rents will render his defence, both in point of protection and prevention, as adequate and efficacious as can be.

The other branch of the defence stands, however, in a very different position, and is subject to entirely different rules. The deeds under which the complainant claims the rents in controversy show on their face that she is the absolute owner, for her own use, of the lands from which the rents were derived. So long as the deeds stand in their original form, the complainant's title to the rents must be regarded as perfect. The defendant seeks to change the form of the deeds, or at least their effect. They are now absolute, investing the complainant with a perfect legal title to the lands for her own use. The defendant seeks to fasten a trust upon the complainant's title. This can only be done by the decree of this court, and until this court has declared, by its decree, that the complainant's title is subject to a trust, the deeds must be construed and enforced, here and elsewhere, according to their plain terms. No such decree can be made except upon a bill, either original or cross. Parol evidence is admissible for the purpose of establishing a resulting trust, but not for the purpose of contradicting the terms of a valid written contract. If evidence of this kind should be offered and received in this case, under an answer alone, the only office it could perform would be to contradict the terms of the deeds; for, in this condition of the pleadings, the court would be powerless, even if such should be shown to be the fact, to fasten a trust on the complainant's title. So that the only purpose the admission of such evidence could

serve, if the cross-bill is suppressed, would be to contradict the terms of the deeds. But with the cross-bill constituting part of the record in the case, such evidence could be properly received, not for the purposes of contradiction, but to lay the foundation for effecting a change, by judicial means, in the complainant's title—by making her title, which is now free and unlogged, subject to a trust. The case must, in my judgment, be ruled by the principles which govern the reformation of written contracts. In the absence of fraud, a defendant cannot show, under an answer alone, that a contract which is perfect and complete in all its parts differs, in a material respect, from the contract which he made; but if he desires to show that such is the fact, he must ask by cross-bill to have the contract reformed. *Van Syckel v. Dalrymple*, 32 N. J. Eq., 233, S. C. on appeal, Id. 826. * * *

The complainant's motion must, therefore, be denied.

DOBSON v. PEARCE. ✓

12 N. Y., 156. [1854.]

The action was commenced in New York Superior Court on the 26th of September, 1850. The complaint was on a judgment for \$612.93, recovered in that court in April, 1846, in favor of one Olney against Pearce, the defendant in this suit, alleging an assignment thereof from Olney to Dobson, the plaintiff, just previous to the commencement of the action.

The defendant by his answer alleged that the judgment was entered in a suit commenced against him, in favor of Olney, by the service of a *capias* upon him in February, 1846, when he was casually in New York, he then and even after being a resident of Connecticut; that Olney had no just or legal demand against him when the *capias* was served and that he was induced by fraudulent representations and assurances of Olney, made to him after the *capias* was served, and upon which he relied, to the effect that no further proceedings would be taken in the suit, not to appear therein; and that afterwards Olney fraudulently and without the knowledge of the defendant procured the judgment mentioned in the complaint to be entered in the suit upon a false and unfounded claim, and known so to be by Olney at the time; that in 1848 Olney commenced an action of debt on the judgment

against the defendant, in the superior court of the State of Connecticut. Thereupon, the defendant commenced a suit in chancery against Olney, before the same court in Connecticut, alleging that the judgment was procured to be entered by fraud on the part of Olney, and praying the court to perpetually enjoin him from further prosecuting it. Olney appeared in and defended the chancery suit by attorney; and on the 10th of September, 1850, a decree was made therein, declaring the judgment fraudulent and perpetually enjoining Olney from further prosecuting the action upon it; that in submission to this decree, the action upon the judgment in the superior court of Connecticut was discontinued; and that the pretended assignment to the plaintiff was made after the decree and with full knowledge of it and of the fraud in procuring the judgment. The plaintiff replied, denying the allegations in the answer.

The suit was tried first in 1851, when a verdict was rendered in favor of the plaintiff; this was set aside and a new trial ordered. (See 1 Duer, 142.) On a second trial, in 1853, the court directed the complaint to be dismissed; this was set aside and a third trial ordered. The third trial was had before Justice Duer and a jury, in 1853. On this trial the plaintiff proved the judgment described in the complaint, and the assignment thereof by Olney to the plaintiff, on the 11th of September, 1850, and rested.

The defendant offered in evidence a duly authenticated copy of the record of the proceedings in the suit in chancery in the superior court of Connecticut, mentioned in the answer. The counsel for the plaintiff objected to it as evidence; the objection was overruled and the same received and read in evidence, and plaintiff's counsel excepted. From this record it appeared that Pearce commenced suit in chancery against Olney in the superior court of Connecticut, in 1849, and in the bill or petition for relief he stated the entry of the judgment against him in the superior court of New York, and alleged that there was no just or legal demand against him in the suit in which it was entered; that he was prevented from appearing in that suit by the fraudulent representations and assurances of Olney, detailing them, and that the judgment was procured to be entered by fraud on the part of Olney; that Olney had commenced an action of debt against him on the judgment in the superior court of Connecticut, which was pending; and prayed relief. Olney appeared in and defended the chancery suit by George Perkins, Esq., an attorney. It was

referred to a committee to hear the evidence and report the facts. At the March term of the court, in 1850, the cause was heard on the report of the committee and objections made thereto by the counsel for Olney, and thereupon at that term, the court found, from the facts stated in the report of the committee, that the material allegations in the bill were true; and afterwards, at a term of the court held on the second Tuesday of September, 1850, a decree was made by which the material facts stated in the bill were declared to be true, and Olney was enjoined from prosecuting his action of debt upon the judgment under a penalty of one thousand dollars, and adjudged to pay the costs of the chancery suit.

The counsel for the defendant read in evidence a duly authenticated copy of the record of the proceedings in the action of debt on the judgment rendered in the New York Superior Court, commenced by Olney in the Superior Court of Connecticut. To the admission of this record in evidence, the counsel for the plaintiff duly objected; the objection was overruled and he excepted. By this record it appeared that the action was commenced in November, 1848, and prosecuted by George Perkins, Esq., as attorney for Olney; that Pearee appeared therein, and that on the 8th of April, 1850, the suit was discontinued with the leave of the court. The counsel for the defendant further proved that the judgment mentioned in the records of the proceedings in the suit at law, and the chancery suit prosecuted in the Superior Court of Connecticut, was the same judgment mentioned in the complaint herein; and that the suit at law was discontinued after the committee appointed in the chancery suit had reported the facts to the court and notice thereof had been served on the attorney of Olney. It was further proved that the assignment of the judgment to this plaintiff was after the final decree in the chancery suit had been made, and after notice of it to Olney and the plaintiff. The justice before whom the cause was tried instructed the jury that the record of the proceedings, finding and decree of the Superior Court of Connecticut in the chancery suit, was conclusive evidence against the plaintiff to sustain the allegations in the defendant's answer, if the jury found that Olney appeared in that suit by an attorney who was authorized by him to do so; that if the jury did not so find, then this record did not affect the plaintiff. The counsel for the plaintiff excepted to such instructions. The jury rendered a verdict in favor of the defend-

ant. The judgment rendered on this verdict was affirmed at a general term of the Superior Court. The plaintiff appealed to this court.

W. F. ALLEN, J.: A judgment rendered by a court of competent jurisdiction cannot be impeached collaterally for error or irregularity, but is conclusive until set aside or reversed by the same court or some other court having appellate jurisdiction. (Smith v. Lewis, 3 J. R., 157; Homer v. Field, 1 Pick., 435.) The jurisdiction of the court in which a judgment has been recovered is, however, always open to inquiry; and if it has exceeded its jurisdiction, or has not acquired jurisdiction of the parties by the due service of process or by voluntary appearance, the proceedings are *coram non judice* and the judgment void. The want of jurisdiction has always been held to be a valid defence to an action upon a judgment, and a good answer to it when set up for any purpose.

So fraud and imposition invalidate a judgment, as they do all acts; and it is not without semblance of authority that it has been suggested that at law the fraud may be alleged, whenever the party seeks to avail himself of the result of his own fraudulent conduct by setting up the judgment, the fruits of his fraud. (See per Thompson, C. J., in Borden v. Fitch, 15 J. R., 121, and cases cited.) But whether this be so or not, it is unquestionable that a court of chancery has power to grant relief against judgments when obtained by fraud. Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not avail himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an interference by a court of equity. (Reigal v. Wood, 1 J. C. R., 402; McDonald v. Neilson, 2 Cow. Rep., 139; Duncan v. Lyon, 3 J. C. R., 351; Marine Ins. Co. of Alexandria v. Hodgson, 6 Cranch, 206; Shottenkirk v. Wheeler, 3 J. C. R., 275.)

Under our present judiciary systems, the functions of the courts of common law and of chancery are united in the same court, and the distinctions between actions at law and suits in equity, and the forms of all such actions and suits are abolished, and the defendant may set forth by answer as many defences as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. (Code §§ 69, 150.) The Code also authorizes affirmative relief to be given to a defendant

in an action by the judgment. (§ 274.) The intent of the legislature is very clear, that all controversies respecting the subject matter of the litigation should be determined in one action, and the provisions are adapted to give effect to that intent. Whether therefore, fraud or imposition in the recovery of a judgment could heretofore have been alleged against it collaterally at law or not, it may now be set up as an equitable defence to defeat a recovery upon it. Under the head of equitable defences are included all matters which would before have authorized an application to the court of chancery for relief against a legal liability, but which, at law, could not have been pleaded in bar. The facts alleged by way of defence in this action would have been good cause for relief against the judgment in a court of chancery, and under our present system are, therefore, proper matters of defence; and there was no necessity or propriety for a resort to a separate action to vacate the judgment. In Connecticut, although law and equity are administered by the same judges, still the distinction between these systems is preserved, and justice is administered under the head of common law and chancery jurisdiction by distinct and appropriate forms of procedure; and hence, as it was at least doubtful whether at law the fraud alleged would bar a recovery upon the judgment, a resort to the chancery powers of the court of that state was proper, if not necessary.

The right of the plaintiff in the judgment was a personal right and followed his person; and, aside from the fact that he had resorted to the courts of Connecticut to enforce his claim under the judgment, the courts of that state, having obtained jurisdiction of his person by the due service of process within the state, had full power to pronounce upon the rights of the parties in respect to the judgment and to decree concerning it. It necessarily follows that the decree of the Superior Court of Connecticut, sitting as a court of chancery, directly upon the question of fraud, is conclusive upon the parties to that litigation, and all persons claiming under them with notice of the adjudication. The judgment of a court of competent jurisdiction upon a point litigated between the parties, is conclusive in all subsequent controversies where the same point comes again in question between the same parties. (*White v. Coatsworth*, 2 Seld., 137; *Embury v. Conner*, 3 Comst., 522.) In the State of Connecticut it is quite clear the question of fraud would not be

an open question between the parties, but would be considered entirely settled by the decree of the court of that state; and as full faith and credit are to be given by each state to the judicial proceedings of every other state, that is, the same credit, validity and effect as they would have in the state in which they were had, the parties are concluded in the courts of this state by the judgment of the court in Connecticut directly upon the question in issue. (*Hampton v. McConnel*, 3 Wheat., 234.) The decree of the court of chancery of the State of Connecticut as an operative decree, so far as it enjoined and restrained the parties, had and has no extra-territorial efficacy, as an injunction does not affect the courts of this state; but the judgment of the court upon the matters litigated is conclusive upon the parties everywhere, and in every forum where the same matters are drawn in question. It is not the particular relief which was granted which affects the parties litigating in the courts of this state; but it is the adjudication and determination of facts by that court, the final decision that judgment was procured by fraud, which is operative here and necessarily prevents the plaintiff from asserting any claim under it. The court acquired jurisdiction of the parties by the commencement of the action, and the service of the process upon the defendant therein, and his appearance by an unauthorized attorney; and the withdrawal of the action of debt upon the judgment did not deprive it of jurisdiction thus acquired.

The judgment of the superior court must be affirmed, with costs.

JOHNSON, J.: The questions in this cause arise upon two exceptions taken at the trial. The first was taken to the decision admitting in evidence the record of a decree in equity, made by the superior court of judicature of the State of Connecticut, between the defendant in this suit and one Olney, the immediate assignor to the plaintiff of the judgment now sued upon. The second was to the instruction of the court to the jury, that the record of the proceedings, finding and decree aforesaid, given in evidence by the defendant to support the allegations in his answer, was, for the purposes of this suit, conclusive evidence upon the plaintiff, if the jury found that Olney appeared in that cause by his authorized attorney.

The plaintiff is in the same position which Olney would have occupied had he been plaintiff; he is the immediate assignee of

Olney, against whom, before the assignment, the decree was pronounced; and if it be material, he had actual notice of the decree when the assignment was made to him. Giving to the plaintiff's objection to the admission of the record the broadest effect, the first question is whether the defence set up by the answer was available. That defence is, in substance, that the judgment sued upon was fraudulently entered up after assurances on behalf of the plaintiff in that suit to the defendant, that no further proceedings should be taken in it without notice to him, whereby he was induced not to take steps to interpose a defence which, in point of fact, he could successfully have maintained.

Relief against such a judgment, upon these facts, would have been within the power of a court of equity in this state, upon a bill filed for that purpose. (2 Story's Eq. Jur., §§ 887, 896; *Huggins v. King*, 3 Barb., 616.) The Code, § 69, having abolished the distinction between the actions at law and suits in equity, and the forms of all such actions theretofore existing, an equitable defence to a civil action is now as available as a legal defence. The question now is, ought the plaintiff to recover; and anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or legal cognizance. The next question is whether the record of the decree of the Superior Court of Connecticut was competent evidence upon that issue. Olney actually appeared by his attorney in that suit and was heard upon its merits. He was, therefore, before that court, and it had jurisdiction of his person if it had jurisdiction of the subject matter of the suit. The object of the suit was to restrain Olney from prosecuting a suit at law in the same court upon the judgment in suit here, and the grounds upon which that relief was sought were the same which were set up as a defence here. The jurisdiction to restrain suits at law being one of the firmly established parts of the authority of courts of equity, and the plaintiff, in the suit which was enjoined, having undertaken to prosecute that suit in a court of law of the State of Connecticut, the only conceivable grounds for denying the equitable jurisdiction which was exercised in the case are, either that no court of equity anywhere has power to restrain a suit upon a judgment at law upon such grounds, or that a court of equity in one state has no jurisdiction to restrain such a suit upon a judgment of a court of law of another state. The first of these grounds has already been considered and found un-

sound. The other rests either upon some ground of comity between the states, or upon the force of the constitution and laws of the United States. The objection, so far as it is founded upon an assumed violation of the comity which exists between the several states of the United States, does not reach to the jurisdiction of the court. The rules of comity may be a restraint upon a court in the exercise of an authority which it actually possesses, but it is self-imposed. (*Bank of Augusta v. Earle*, 13 Pet., 519.) The courts of each state must judge for themselves exclusively how far they will be restrained, and in what cases they will exercise their power, except where the constitution of the United States and the laws made in pursuance of it prescribe a rule. Where that is the case, the question ceases to be one of comity and becomes one of right.

The question then remains to be considered upon the constitution and laws of the United States, and here the decisions permit of no doubt. Full faith and credit are given to the judgments of a state court, when in the courts of another state it receives the same faith and credit to which it was entitled in the state where it was pronounced. (*Hampton v. McConnell*, 3 Wheat., 234.)

We have then a decree of the Superior Court of Connecticut in a cause where they had jurisdiction of the subject matter and of the parties, and it is duly authenticated and relevant to the issue on trial. Its admissibility in evidence follows, of course.

By the record of that decree it appears that the very matters in issue here were litigated there, and were decided adversely to Olney, whom the plaintiff represents. The determination is necessarily conclusive upon him as to all the material facts there litigated and determined. The judgment should be affirmed with costs.

Judgment accordingly.

HANCOCK v. BLACKWELL.

139 Mo., 440. [1897.]

Action at law for slander, to which defendant pleaded a release. The plaintiff filed a reply, alleging that she had been induced to execute the release by means of certain false and fraudulent representations on the part of the defendant. The court overruled the defendant's motion to strike out these allegations of

the reply, and submitted the whole case to the jury, which returned a verdict for the plaintiff. The defendant appealed.*

BURGESS, J.: * * * 2. The next question is with respect to the action of the court in overruling defendant's motion to strike out that part of plaintiff's reply to defendant's answer, in which it is averred that the release set up in the answer was obtained by fraud, and fraudulent representations. It may be conceded that when a contract has been obtained from a person incompetent to contract or from a competent person by misreading, the surreptitious substitution of one paper for another, or has been obtained by some other trick or device an instrument which he did not intend to give, or where no consideration has passed for the release, that such fraud or want of consideration may be shown in a proceeding at law; so that the authorities bearing upon that class of cases need not be further noticed in passing upon the question involved in this case. The plaintiff admits that she signed the release, knowing at the time what it was, its purpose and effect, but seeks to avoid its legal effect as a bar to this action upon the ground that she was induced to execute it by fraudulent representations, and undue influence. When the release was executed by plaintiff it was, to all intents and purposes, a bar to this action until set aside in a direct proceeding in equity for that purpose, in which event the money received in consideration for the release must be tendered back and the defendant put in *statu quo*. The rule is thus announced in *Cleary v. Electric Light Co.*, 19 N. Y. Supp., 951. "The rule undoubtedly is, that where a party seeks to rescind the contract on the ground of fraud or imposition, he must tender a return of what he has received under it before he can maintain an action at law; and, in an action in equity, he must at least tender a return by his bill of complaint." The same rule is announced in *Insurance Company v. Howard*, 111 Ind., 544; *Gould v. Bank*, 86 N. Y., 75; *McMichael v. Kilmer*, 76 N. Y., 36; *Ryan v. Ward*, 48 N. Y. 204; *Coon v. Knap*, 8 N. Y., 402. So in *Vandevelden v. Railroad*, 61 Fed. Rep., 54, it was said: "In an action at law for personal injuries, a release intentionally executed by plaintiff for a money consideration, knowing the legal effect thereof, can not be attacked, or its effect as a complete bar avoided, by showing that plaintiff was induced to sign it by the misrepresentation of defendant's surgeon, who attended him, as to the per-

*The statement has been condensed.

manent character of his injuries. The action, however, may be suspended while plaintiff brings an independent suit in equity to rescind the release for fraud." In *George v. Tate*, 102 U. S., 564, it was held that the remedy under such circumstances is by a direct proceeding to avoid the instrument. See also *Stuart v. Rector*, 1 Mo., 361; *Mitchell v. Parker*, 25 Mo., 31; *Kearney v. Vaughan*, 50 Mo., 284; *Och v. Railroad*, 130 Mo., 27; *Homuth v. R. R.*, 129 Mo., 629. In such circumstances the issue of fraud should be tried by the court; and the evidence, in order to justify the setting aside of the release, should be clear and satisfactory, "such as will preponderate over presumption or evidence on the other side." (1 *Bigelow on the Law of Frauds*, p. 123.) By proceeding this way the burden of proof rests on the plaintiff to establish the fraud by clear and satisfactory evidence, while in trying such an issue before a jury a preponderance of evidence is only required to set aside the release. The plaintiff should not, under the circumstances, be permitted to ignore the release, and prosecute her action at law without first having the release set aside by a proceeding in equity for that purpose, either by original bill, or, as the offer to refund the money was made before the commencement of the suit, by amending the petition so as to embrace a count for that purpose. (*Blair v. Railroad*, 89 Mo., 383; *Och v. Railroad*, *supra*; *Homuth v. Railroad*, *supra*.)

3. There was evidence tending to show that the release was obtained by fraud, and there is nothing disclosed by the record which will preclude plaintiff from proceeding in equity to set it aside should the evidence be found to be sufficient by the court upon the trial of that issue. * * *

*Reversed and remanded.**

*Mo. R. S. 1899, sec. 654. *Plaintiff in reply may allege fraud in obtaining release set up in answer—issues, verdict, etc.*

Whenever a release, composition, settlement or other discharge of the cause of action sued on shall be set up or pleaded in the answer in bar of plaintiff's cause of action sued on, it shall be permissible in the reply to allege any facts showing or tending to show that said release, composition, settlement or other discharge was fraudulently or wrongfully procured from the plaintiff, and the issue or issues thus raised shall be submitted with all the other issues in the case to the jury, and a general verdict or finding upon all the issues, including the issue or issues of fraud so raised, shall be sufficient. (New section.)

CONGER v. PARKER. ✓

29 Ind., 380. [1868.]

FRAZER, J.: The complaint alleges a conveyance by a deed, with the usual covenants, of a certain tract of land by the defendant to the plaintiff; that at the time of the conveyance there were upon the land growing crops, to-wit: wheat of the value of \$300; apples of the value of \$50; clover of the value of \$100; and rails for the use of the farm and in fences, all of which the defendant took and converted to his own use. To this the defendant answered, as a defence to the whole action, that by the contract actually made, and intended by the parties to be embodied in the deed, the wheat was reserved to the defendant, but by mistake of the conveyance, the reservation thereof was omitted, and not inserted in the deed. A demurrer to this answer, for the want of sufficient facts, was overruled, and this presents the only question before us needing particular notice.

The answer was clearly bad. It professed to answer the whole complaint, and yet, at best, it only answered a part. As to the clover, apples, fences, and rails, it was wholly silent in everything that would even tend to preclude a recovery therefor. But the answer is bad for another reason. When a mistake in a deed or written instrument is relied upon, the pleading should go further than in this case it did. It should have prayed affirmative relief; that the instrument be reformed so as to show the contract intended to have been embodied in it, and that when so reformed, it might be allowed as a bar to the suit, or so much thereof as it would bar. This might be done by answer in the nature of a cross-bill in equity. It is not, under the code, necessary to bring an independent suit for the purpose, as it was formerly, when the original suit was at law.

Rigsbee v. Trees, 21 Ind., 227, is not in conflict with our present ruling. That was a suit to correct a mistake in a promissory note as to the amount thereof, and for judgment on the note when so corrected. The court found the mistake as alleged, and without first formerly correcting the note, rendered judgment for the true amount. It was merely held that the formal omission was not error available to the defendant in that case. * * *

The judgment is reversed with costs, and the cause remanded, with instructions to sustain the demurrers to the second and third paragraphs of the answer.

KIRK v. HAMILTON. ✓

102 U. S., 68.* [1880.]

Error to the Supreme Court of the District of Columbia. This was an action of ejectment, brought December 21, 1872, by George E. Kirk, against Charles O. Hamilton and Catherine Hamilton, to recover parts of lots 7 and 9 in square 437 in the city of Washington. The defendants pleaded not guilty. A verdict was returned in their favor, and, a new trial having been refused, judgment was entered on the verdict. Kirk sued out this writ.

The plaintiff claimed title as original owner. The defendants claimed title under a trustee's sale made under a decree in a judgment creditor's action against Kirk and others. The facts sufficiently appear in the opinion.

Mr. Justice HARLAN, after stating the case, delivered the opinion of the court.

It appears from the first bill of exceptions that, upon the trial of the cause, the plaintiff, to maintain the issue joined, gave evidence to the jury tending to prove title in himself to the land in dispute, as well as his actual possession of the premises under that title; that he had fully discharged the indebtedness secured by the two deeds of trust executed, one to Lenox and Naylor, and the other to Clarke and Smith; that Charles Stott, on the 14th of May, 1872, reconveyed to him all that portion of the premises which, on the 22nd of March, 1856, he had conveyed to Stott; that he had never made nor authorized any other conveyances than those just named. He also introduced a deed from Carrington, as the supposed trustee in the case of Moore & Co. v. Kirk, etc., at the same time, however, denying its validity, and avowing that it was introduced subject to his exceptions reserved, and to be thereafter presented, as to its sufficiency in law to prove title in the defendants or either of them. It was admitted by the

*The statement has been condensed.

court subject to these exceptions. The plaintiff further gave evidence to prove that defendants were in possession of the premises at the commencement of the action, and then rested.

The bill of exceptions then shows that defendants, to sustain their defence, and to prove title out of the plaintiff, offered to read in evidence the record of the equity suit of Moore & Co. v. Kirk, etc. Plaintiff insisted that the record of that suit was insufficient in law to maintain the issue on the defendant's behalf, or to show title in them, and asked the court to inform the jury that it should not then be admitted in evidence, except subject to his exceptions as to its sufficiency in law, or to be thereafter presented to the court pending the further trial of the cause. The record was so admitted. The defendants, further to maintain their defence, and to prove title in themselves, offered to introduce testimony tending to prove that, at the time of the purchase of the premises at the sale made by Carrington, trustee, in the suit of Moore & Co. v. Kirk, etc., the only improvement thereon was a two-story four-roomed brick house, and that, about the year 1868, the defendants erected an extensive building on the property, at a cost of some \$4,000; that when they began such building, and for some time thereafter, the plaintiff Kirk resided upon the adjoining premises; that during all that time he well knew of said improvements, made no objection thereto, and asserted no claim to the property, except the west three feet thereof, adjoining his ground, and which he claimed as an alley, and, even as to such portion, he subsequently informed the witness he was mistaken; and, lastly, that the plaintiff, though residing in the city of Washington ever since about the year 1865, never, to defendant's knowledge, until the commencement of this action, asserted any claim to the premises in dispute.

At that stage of the trial the plaintiff interposed and asked the court to inform the jury that the testimony thus offered, in reference to the defendant's putting improvements on the premises, was inadmissible in law, and that such issue ought to be found for the plaintiff. The court ruled that the testimony was admissible, to which plaintiff excepted. The defendants then gave the said testimony in evidence to the jury, who rendered a verdict against the plaintiff upon the issue set forth by the first bill of exceptions.

The remaining bills of exceptions present, in different forms, the general questions whether the sale by Carrington, as trustee,

on the 19th of April, 1864, was or was not, upon the face of the record of *Moore & Co. v. Kirk, etc.*, a mere nullity. Its validity is assailed by the plaintiff on various grounds, the most important of which seems to be: 1. That as *Moore & Co.* sued in their own behalf only, and not for the benefit of themselves and other creditors, the jurisdiction and power of the court was exhausted by the first sale (of lot No. 78), which raised an amount largely in excess of the claims for which *Moore & Co.* sued. 2. That the utmost which the court, upon the pleadings, could do was to distribute such excess among the other creditors of *Kirk* who should appear, in proper form, and establish their claims. 3. That the court was entirely without jurisdiction to make a second order of sale, and did not assume to exercise any such power. 4. That the second sale by *Carrington*, having been made without any previous order or direction of the court, its confirmation, and the deed subsequently made to *Hamilton*, were absolutely null and void.

In the view we take of the case, it is unnecessary to pass upon these several objections. If it be assumed that the record of the suit of *Moore & Co. v. Kirk, etc.*, was of itself insufficient in law to divest *Kirk* of title to the premises in dispute, or to invest *Hamilton* with title, the question still remains, whether the facts disclosed by the first bill of exceptions do not constitute a defence to the present action.

After the confirmation of the sale of April 19, 1864, before any deed had been made, and while the cause was upon reference for a statement, as well as of the trustee's accounts as for distribution of the fund realized by the sales, *Kirk*, it seems, appeared before the auditor, by an attorney, and made objection to the allowance of the simple-contract debts which had been proven against him in his absence. So far as the record discloses, no other objection to the proceedings was interposed by him. Undoubtedly he then knew, he must be conclusively presumed to have known, after he appeared before the auditor, all that had taken place in that suit during his absence from the District, including the sale of the premises in dispute, which took place only a few months prior to his appearance before the auditor. If that sale was a nullity, the court, upon application by *Kirk*, after his appearance before the auditor, could have disregarded all that had been done subsequently to the first sale, discharged *Hamilton's* bond, returned the money he had paid, and, in addi-

tion, placed Kirk in the actual possession of the property. No such application was made. No such claim asserted. No effort was made by him to prevent the execution of a deed to the purchaser at the second sale. So far as the record shows, he seemed to have acquiesced in what had been done in his absence. In 1868, three years after his return to the city, and two years after Hamilton had secured a deed in pursuance of his purchase, he became aware that Hamilton was in actual possession of the premises, claiming and improving them as his property. He personally knew of Hamilton's expenditures of money in their improvement, and remained silent as to any claim of his own. Indeed, his assertion while the improvements were being made, of claim to only three feet of ground next to the adjoining lot upon which he resided, was, in effect, a disclaimer that he had, or would assert, a claim to the remainder of the lots 7 and 9 which Hamilton had purchased at the sale in April, 1864. And his subsequent declaration that he was in error in claiming even that three feet of ground only added force to his former disclaimer of title in the premises. Hamilton was in possession under an apparent title acquired, as we must assume from the records, in entire good faith, by what he supposed to be a valid judicial sale, under the sanction of a court of general jurisdiction.

The only serious question on this branch of the case is whether, consistently with the authorities, the defence is available to Hamilton in this action of ejectment to recover possession of the property. We are of opinion that the present case comes within the reasons upon which rest the established exceptions to the general rule that title to land cannot be extinguished or transferred by acts *in pais* or by oral declarations. "What I induce my neighbor to regard as true is the truth as between us, if he has been misled by my asseveration," became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by Chancellor Kent in *Wendell v. Van Rensselaer*, 1 Johns. (N. Y.) Ch. 344: "There is no principle better established, in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase, and expend money on land, under an erroneous opinion of title, without making known his own claim, shall not afterwards be permitted to exercise his

legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." p. 354.

While this doctrine originated in courts of equity, it has been applied in cases arising in courts of law.

In *The King v. The Inhabitants of Butterton* (6 Durnf. & E., 554), Mr. Justice Lawrence said: "I remember a case some years ago in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land."

In 2 Smith, Lead. Cas., pp. 730-740 (7th Am. ed., with notes by Hare and Wallace), the authorities are carefully examined. It is there said that there has been an increasing disposition to apply the doctrine of equitable estoppel in courts of law. Again (pp. 733-734): "The question presented in these and other cases, which involve the operation of equitable estoppels on real estate, is both difficult and important. It is undoubtedly true that the title to land cannot be bound by an oral agreement, or passed by matter *in pais*, without an apparent violation of those provisions of the Statute of Frauds which require a writing when the realty is involved. But it is equally well settled that equity will not allow the statute to be used as a means of effecting the fraud which it was designed to prevent, and will withdraw every case not within its spirit from the rigor of its letter, if it be possible to do so without violating the general policy of the act, and giving rise to the uncertainty which it was meant to obviate. It is well established that an estate in land may be virtually transferred from one man to another without a writing, by a verbal sale accompanied by actual possession, or by the failure of the owner to give notice of his title to the purchaser under circumstances where the omission operates as a fraud; and, although the title does not pass under these circumstances, a conveyance will be decreed by a court of equity. It would, therefore, seem too late to contend that the title to real estate cannot be passed by matter *in pais*, without disregarding the Statute of Frauds; and the only room for dispute is as to the forum in which relief must be sought. The remedy in such cases lay originally in an application to chancery, and no redress could be had in a merely legal tribunal, except under rare and exceptional circumstances. But the common law has been enlarged and enriched under the principles and maxims of equity, which are constantly applied at the

present day in this country, and even in England, for the relief of grantees, the protection of mortgagors, and the benefit of purchasers, by a wise adaptation of ancient forms to the more liberal spirit of modern times. The doctrine of equitable estoppel is, as its name indicates, chiefly, if not wholly, derived from courts of equity, and as these courts apply it to any species of property, there would seem no reason why its application should be restricted in courts of law. Protection against fraud is equally necessary, whatever may be the nature of the interest at stake; and there is nothing in the nature of real estate to exclude those wise and salutary principles, which are now adapted without scruple in both jurisdictions, in the case of personalty. And whatever may be the wisdom of the change through which the law has encroached on the jurisdiction of chancery, it has now gone too far to be confined within any limits short of the whole field of jurisprudence. This view is maintained by the main current of decisions.”

This question in a different form was examined in *Dickerson v. Colgrove*, 100 U. S., 578. This was an action of ejectment, and the defence, based upon equitable estoppel, was adjudged to be sufficient. We there held that the action involved both the right of possession and the right of property, and that as the facts developed showed that the plaintiff was not in equity and conscience entitled to disturb the possession of the defendants, there was no reason why the latter might not, under the circumstances disclosed, rely upon the doctrine of equitable estoppel to protect their possession.

Applying these principles to the case in hand, it is clear, upon the fact recited in the first bill of exceptions, and which the jury found to have been established, that the plaintiff is estopped from disturbing the possession of the defendants. He knew, as we have seen, that the defendants claimed the property under a sale made in an equity suit to which he was an original party. The sale may have been a nullity, and it may be that he could have repudiated it as a valid transfer of his right of property. Instead of pursuing that course, he, with a knowledge of all the facts, appeared before the auditor and disputed the right of certain creditors to be paid out of the fund which had been raised by the sale of this property. He forbore to raise any question whatever as to the validity of the sale, and by his conduct indicated his purpose not to make any issue in reference to the pro-

ceedings in the equity suit. Knowing that the defendant's claim to the premises rested upon that sale, he remained silent while the latter expended large sums in their improvement, and, in effect, disclaimed title in himself. He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true and upon the faith of which others acted.

The evidence upon this point was properly admitted, and operated to defeat the action independently of the question whether the sale by Carrington, the trustee, and its confirmation by the court, was, itself, a valid, binding transfer of the title to the purchaser.

What has been said renders it unnecessary to consider the questions of law presented in the remaining bills of exceptions.

*Judgment affirmed.**

MILLER v. FULTON.

47 Cal. 146. [1873.]

Complaint in ejectment in the usual form. The answer denied the allegations of the complaint, and then proceeded by saying, "and further answering," etc., without setting up the other matters as a separate defence, or in the form of a cross-complaint. The matters further answered were that the defendant gave the plaintiff a deed, absolute in form, of the premises, but that the deed was intended as a mortgage to secure a debt due from the defendant to the plaintiff, and that the defendant was ready and willing to pay the debt, and had offered to pay it, but that the plaintiff refused to receive it. The answer also alleged that the defendant was still the owner in fee of the premises. No affirmative relief was asked for. The Court below rendered judgment for the plaintiff, and the defendant appealed.

By the Court: It is well settled that an equitable defence interposed in an action of ejectment should contain in substance the elements of a bill in equity, and that its sufficiency, other than as to mere form, is to be determined by the application of the rules of pleading observed in courts of equity, when relief is sought there. (*Bruck v. Tucker*, 42 Cal. 352, and cases there

*Compare *George v. Tate*, 102 U. S. 564.

cited.) Tested by this rule, the equitable defence attempted here amounts to nothing.

Judgment and order denying new trial affirmed—remittitur forthwith.*

CRARY v. GOODMAN.

12 N. Y. 266. [1855.]

Action to recover possession of a parcel of land situate in Cattaraugus county, commenced in December, 1848. The cause was tried in January, 1850, before Mr. Justice Hoyt. The plaintiff proved that he had the legal title to the premises in controversy. The defendant proved that he occupied the premises as tenant under one Huntley, and that they were adjacent to other lands owned by the latter, and he alleged in his answer, and offered to prove upon the trial, facts tending to show that the land in dispute was included in the purchase, by Huntley, of the adjacent premises from the plaintiff's grantors, and that by a mutual mistake of the parties, it was not included in the conveyance thereof; and that in equity Huntley was entitled, as against the plaintiff, and his grantors, to a conveyance of the premises, the possession of which was in controversy. To this evidence, the counsel for the plaintiff objected; and the justice decided that no equitable defence could be interposed in this action to the plaintiff's right to recover upon the legal title, and rejected the evidence; the counsel for the defendant excepted. A verdict was rendered in favor of the plaintiff. From the judgment entered on this verdict, the defendant appealed. The case was heard on the appeal at a general term of the supreme court in the 8th district, and the judgment affirmed. (See 9 Barbour, 657.) The defendant appealed to this court. The case was submitted on printed briefs.

JOHNSON, J., delivered the opinion of the court:

The principal ground on which this case was disposed of at the trial was, that in an action to recover real property brought under the Code of 1848, when the plaintiff's claim is founded upon a legal title, the defendant cannot avail himself of an equi-

*See also Reilly v. Cullen, 159 Mo. 322.

table right to defeat that title by way of defence in the suit. This, likewise, was the single ground upon which the judgment at the trial was affirmed at the general term. (9 Barb., 657.) Although much difference of opinion has existed in the different courts of this state in regard to the effect of the Code of Procedure in this particular, the question has been adjudged in this court (*Dobson v. Pearce, ante*, 156); and it is now neither necessary nor proper to discuss it. In the case cited, which was an action upon a judgment, the Superior Court of the City of New York allowed, as a defence to the action, facts which made out a right in the defendant to relief upon equitable grounds against the judgment, but which confessedly would not have been available as a defence to the action at law before the Code. The case arose and was tried in the superior court, before the amendments to the Code passed in 1852; one of which provides, in express terms, that the defendant may set up as many defenses as he has, whether they are such as have been theretofore denominated legal, or equitable, or both. This judgment was affirmed in this court upon the ground that since the enactment of the Code, which in terms abolishes the distinction between actions at law and suits in equity, and prescribes but a single form of civil action, the question in an action is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or an equitable defence against the plaintiff's claim; but whether, according to the whole law of the land, applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for.

As the court, upon the defendant's offers of proof, ruled that no equitable defence could be interposed, and in this was, as we have seen, in error, the defendant is entitled to a new trial. We express no opinion whether the defendant did, or did not make out by his offers such an equitable defence, because, if his offer was defective, under the distinct ruling of the court, no alteration in its terms or substance would have availed him. The judgment should be reversed and a new trial ordered.

*Judgment accordingly.**

*SILL, P. J. (in *Crary v. Goodman*, 9 Barbour 657): "It follows that an equitable right in a defendant, to have land conveyed to him, is not a defense to an action for the possession, any more than it was before the Code was adopted. The right to the possession is incidental to the legal title; or rather it is one essential ingredient of it. Where

DALE v. HUNNEMAN.

12 Neb., 221 [1881.]

MAXWELL, C. J.: This is an action in ejectment, the defence being a general denial. Judgment in the court below was rendered in favor of Hunneman. The errors assigned will be considered in their order. * * * Second, it is urged that the court erred in excluding the testimony of the plaintiff (defendant below) as to the value of lasting and valuable improvements erected by him on the premises in controversy.

It appears from the testimony that the plaintiff took possession of the premises in the spring of 1874, under a verbal lease from W. B. Doddridge; that he remained in possession as such tenant until March, 1877, at which time a proposition was made by Doddridge to Dale offering to sell him the premises for the sum of \$1,000, payable in county warrants. This proposition seems to have been accepted; the warrants to be delivered on or before July 1, 1877. None of the warrants have ever been delivered, nor has the plaintiff paid any sum whatever for said premises; nor does he now offer to comply with said contract in any manner or form. This being the case, the mere fact that the plaintiff had made valuable improvements upon the premises constituted no defence to an action for the possession. If the case is within

is the reason for saying that the sixty-ninth section of the code has detached the essential interest from the legal estate and appended it to an equitable interest merely? The argument comes to this, and to maintain the defence, it must be held that the code has transferred the right to the possession of land from the legal owner to him who has an equitable claim to the title. Such an interpretation would produce the consequences which the commissioners said it was their duty to guard against. It would, by construction, "*encroach upon substantial rights,*" which both the common law and pre-existing statutes concurred in securing to him who holds the legal title. It seems to me that the defendant's argument, when followed out, destroys itself. The facts offered to be proved by him, are claimed to constitute an *equitable* defence to the action. But to give it efficacy, it is necessary to insist that the equitable owner has the right to possession, as between him and the owner in fee. If this were so, the defence would be a legal one. The action is for the possession, and he who is entitled to the possession is, by the *common law*, entitled to judgment. Thus the case is placed without the operation of the section, the application of which is indispensable, as a starting point in the argument."

the provisions of the occupying claimant's act, he may still apply for relief as to the value of such improvements. Section 626 of the Code provides that "in an action for the recovery of real property it shall be sufficient if the plaintiff state in his petition that he has a legal estate therein, and is entitled to the possession thereof," etc.

Section 627 provides that "it shall be sufficient in such action if the defendant in his answer deny generally the title alleged in the petition, or that he withholds the possession, as the case may be; but if he deny the title of the plaintiff, possession of the defendant will be admitted." The action of ejectment was originally devised to enable a tenant for years to recover the possession of the demised premises during the term, real actions at that time being confined to freehold estates. Blackstone says: "In order to maintain the action, the plaintiff must, in case of any defence, make out four points before the court, viz., title, lease, entry, and ouster. *First*, he must show a good title in his lessor, which brings the matter of right entirely before the court; then that the lessor, being seized or possessed by virtue of such title, did make him the lease for the present term; *thirdly*, that he, the lessee or plaintiff, did enter or take possession in consequence of such lease; and then, *lastly*, that the defendant ousted, or ejected him." 3 Black. Com. 202.

The form of the action was afterwards modified so as to allow no question to be raised except that of title and possession; and if the plaintiff was entitled to the possession, he could recover whether the party in possession had ousted him or not. Under the Code, to entitle the plaintiff to recover, he must possess a legal estate in the premises, and must state in his petition that he is entitled to the possession of the premises. Where the facts stated in the petition are denied, the plaintiff, to be entitled to recover, must prove that he possesses a legal estate in the premises and is entitled to the possession of the same. If the defendant possesses an equity which negatives the plaintiff's right of possession, such equity may be proved under a general denial, as it is a mere defence to the action. But if the defendant seeks affirmative relief, such as to enforce a contract which does not give him the right of possession, but does give him a right to demand a specific performance of the contract by the plaintiff, by which the right to continue in possession of the premises depends, he must plead the facts entitling him to such relief and

his answer must contain all the facts necessary to entitle him to such relief. In other words, he may set up in his answer the facts showing him to have an equitable right to a conveyance from the plaintiff, and if he prove himself to be equitably the owner and entitled to the possession, he will not only defeat the action, but obtain affirmative relief. In all cases where affirmative relief is sought by the defendant, the facts entitling him thereto must be set up in the answer. See, Bliss, Code Pleadings, §§ 349-351; *Dewey v. Hoag*, 15 Barb. 365; *Dupont v. Davis*, 35 Wis. 631; *Estada v. Murphy*, 19 Cal. 248; *Blum v. Robertson*, 24 Cal. 128; *Bruck v. Tucker*, 42 Cal. 346.

The reason is, a counter-claim is an independent cause of action, in which the defendant becomes an actor in respect to his claim, and it is required to be stated with the same distinctness and certainty as in a petition. The evidence as to the value of the improvements was inadmissible under the pleadings, and was properly excluded.

The judgment of the district court is clearly right, and is affirmed.

LOMBARD v. COWHAM.

31 Wis. 486. [1871.]

Error to the Circuit Court for Winnebago County.

This action below was brought by Lombard to recover the undivided one-half of an eighty acre lot situated in the county of Fond du Lac. The complaint is the usual form of complaints in actions of ejectment. The answer is, 1st, A general denial; 2nd, The statute of limitations; 3rd, An estoppel. The Circuit Court seems to have held that the special answers were defective, and that no testimony was admissible on behalf of the defendant, except such as was admissible under the general denial alone.

It appears that the land in controversy was purchased of the government, in 1847, by one Andrew Meritt, who died intestate and seized of such land, in 1855, leaving his two sisters, Polly A. Little and Betsey R. Clark, his sole heirs-at-law. The plaintiff claims title under a conveyance from Betsey R. Clark, executed in 1870; and the defendant claims title under a conveyance

executed in 1856 by the administrator of the estate of Andrew Meritt to one Ackerson, and mesne conveyances from the latter to the defendant.

The estoppel pleaded, or attempted to be, is to the effect that the purchase money paid by Ackerson for the land was used to pay the debts of the intestate chargeable upon the estate, and, a surplus remaining after paying such debts, the same was distributed to the heirs; and that Mrs. Clark, with full knowledge of all the facts, received her portion of the surplus and retains the same; and further, that the plaintiff is chargeable with notice of the foregoing facts when he took a conveyance of the land from Mrs. Clark.

The court (under objection) admitted testimony tending to show that the plaintiff procured such conveyance by fraudulently representing to Mrs. Clark that he desired it for the benefit of the purchaser at the administrator's sale, and to cure certain defects in his title; and that she executed the same for a nominal consideration, and for the sole purpose of confirming and ratifying the title of such purchaser. These facts are not stated in the answer.

The following instruction was asked on behalf of the plaintiff, and refused: "In this action, under the pleadings, you cannot consider any equities of the defendant. The legal title must prevail over any equitable claim or title." The court instructed the jury as follows: "There is in this action and upon this testimony but one question for your determination, and that is the question whether the deed under which the plaintiff claims from Betsey R. Clark, was fraudulently procured by the plaintiff or his agent. If it was procured by fraudulent representations that the plaintiff or his agent was obtaining this deed for the benefit and for the purpose of supporting the title of the grantee in the administrator's deed and those holding under him, and you believe that to be true from the testimony in this case, that deed is void, the plaintiff has no title, and the defendant is entitled to your verdict."

The jury returned a verdict for the defendant; and judgment pursuant thereto was duly entered and perfected against the plaintiff; who brought the case to this court by writ of error.

* * *

LYON, J. It seems to be conceded that the proceedings in the probate court preliminary to the sale and conveyance of the land

in controversy, by the administrator of the estate of Meritt to the grantor of the defendant, are so defective and irregular that they will not support a conveyance, and hence, that the administrator's deed is void. If that deed is void, the legal title to an undivided half of the land was in Mrs. Clark until she conveyed to the plaintiff in 1870. The circuit court held that if the plaintiff or his agent procured the conveyance from Mrs. Clark by fraudulently representing to her that he desired it for the benefit of the grantee in the administrator's deed, or those claiming under such grantee, and if Mrs. Clark executed the conveyance with the intention, and for the purpose of ratifying and confirming the title of those holding under the administrator's deed, the conveyance to the plaintiff is void, and the title still remains in Mrs. Clark. We think that this is an error, and that at least the *legal* title passed to the plaintiff by virtue of such conveyance.

But, assuming that the plaintiff obtained his title by the fraudulent means just mentioned, is the defendant affected by that fact, and can he claim an equitable interest in the land in controversy by reason of the alleged fraud? We think this question has been determined by this court in the case of *Onson v. Cown*, 22 Wis. 329. That, also, was an action of ejectment. The defence was that the land in controversy was school land; that the defendant once held a certificate therefor from the state, which became forfeited for nonpayment of interest, and the land was resold to one Keyes; that Larson, the grantor of the plaintiff, applied to Keyes to purchase the land, and stated that he desired to do so for the benefit of the defendant; and that thereupon Keyes assigned his certificate to Larson, who paid for the land and took a patent therefor from the state. There had been no previous arrangement between Larson and the defendant concerning the land. The answer contained a counter-claim, and demanded that the plaintiff be adjudged to convey the land to the defendant. This was held to be a good defence and counter-claim; and the facts therein stated having been proved, the plaintiff (who had notice of such facts when he took his conveyance) was compelled to convey the land, to which his grantor had thus fraudulently obtained title, to the defendant. There were some equities to be adjusted in that case which do not exist here. The principle applied in that case is thus stated in *Perry on Trusts*, § 172: "If a purchaser at auction or otherwise represents that he is purchasing or bidding for some other person,

as for the debtor in a sale under an execution, or for the mortgagor in a sale under a foreclosure, or for the family under an executor's or administrator's sale, and competition is thus prevented, and the sale is made on his own terms, equity will decree that such person shall be a trustee for the person for whom he represented that he was acting."

It will be observed that conveyances thus obtained are not declared void, but are held to pass the legal estate to the grantee, but subject, in equity, to a trust in favor of him for whom the grantor professed to act, coextensive with his profession or representation in that behalf.

But it may be argued that it is quite immaterial in this case whether the conveyance to the plaintiff be held void, or whether it be held valid to pass the legal title, with a trust engrafted upon it in favor of the defendant, inasmuch as, in either case, the plaintiff must fail in his action; and hence that the judgment should not be reversed because the court erred in the instruction that the conveyance was void if obtained by means of fraudulent representations stated in the charge. A little reflection will satisfy the mind that the argument is unsound. The error is not immaterial. Were the conveyance to plaintiff void in the contingency mentioned, the question of the existence of such contingency would be one of fact for the jury to determine, and would doubtless be available to the defendant, as a defence, under the pleadings. To prove that the conveyance under which the plaintiff claims title is void, is merely one method of proving that the title to the land in controversy is in some third party. This is strictly a legal defence, is admissible under the general denial, and, when proved, defeats the action.

But the conveyance being a valid one to pass the legal title to the plaintiff, the defence that it enures to the benefit of the defendant is purely an equitable defence in that, if established, it results in the declaration and enforcement of a trust, which is a matter cognizable in courts of equity alone. The issue upon such a defence, if affirmative relief is demanded by the defendant, is triable by the court, unless the court shall order the same to be tried by a jury, as it may order questions of fact to be so tried in other equity cases, in its discretion. *Tay. Stat.*, 1494, § 6. But in such case the verdict does not have the same force and effect as verdicts in actions at law. It is not binding upon the judgment of the court, and if unsatisfactory and against the weight

of the testimony, the court may set it aside and order a new trial of the issue, or may vacate the order awarding a jury trial, and decide the issue without intervention of a jury. Jackman's Appeal, 26 Wis., 104. That the court should retain this plenary control over verdicts in equity cases where jury trials are awarded, is a material and valuable right of the parties. Hence, an error which results in depriving the court of that power, must necessarily be a material error.

The counsel for the defendant, evidently perceiving the difficulty, argue in their brief that in cases of fraud, equity and law have concurrent jurisdiction. In some cases of fraud this is true, but it is not true as a general proposition. We apprehend that the learned counsel would be at a loss how to proceed, in order to procure in an action at law a declaration and enforcement of the trust which may result to their client by reason of the alleged fraud of the plaintiff in procuring his conveyance.

The defence, being an equitable one, to be available in an action of ejectment, must be set up in the answer, and be accompanied by a demand for such relief as the defendant supposes himself entitled to. Tay. Stat., 1667, § 7 (R. S., Ch. 141, sec. 7.) A mere equitable defence is not sufficient. There must be a counter-claim also. The statute was doubtless intended to avoid the difficulty suggested by Hand, J., in Dewey v. Hoag, 15 Barb. 365. He says: "I do not understand there is any equitable defence, simply as a defence, in an action of ejectment. The effect of that might be to keep the legal title and possession forever separate." (p. 369.)

The court erred, therefore, in admitting, under the pleadings, testimony tending to show that the plaintiff procured his conveyance by representing to Mrs. Clark, his grantor, that he desired it for the benefit of the purchaser at the administrator's sale, or those claiming under him. There must be a new trial; but, under the circumstances, the defendant should be permitted, on such terms as the circuit court shall deem just, to amend his answer so as to interpose such equitable defence and counter-claim.

The case of Kent v. Agard, 24 Wis. 378, does not conflict with the foregoing views. It was there held that in an action of ejectment a party may show, without specially pleading the fact, that a conveyance, absolute upon its face, is a mortgage, and that the debt which it was given to secure has been paid. There is

raised is
no defense
to ejectment
suit.

must file
interclaim
laying con-
cession

no doubt of the correctness of that decision; and it is perfectly clear that it is not applicable to this case.

By the Court: Judgment reversed, and a new trial awarded.

Section 4. Counter Claims.

VASSEAR v. LIVINGSTON.

13 N. Y. 248. [1855.]

The action was brought in 1853 by the plaintiff, as the assignee of Alexander H. Ritchie, and the complaint set forth that the defendant employed Ritchie to engrave four likenesses for \$50 each, which Ritchie, it was alleged, had done, and that the defendant had refused to receive the plates and pay for the engraving; and furthermore that Ritchie had assigned the demand to the plaintiff. The answer denied the allegation of the complaint, and as a further and separate answer set forth that Ritchie had agreed to engrave the four plates from daguerreotype portraits for the defendant, and to finish and deliver them within six weeks from April 2nd, 1853; that he had failed to perform that agreement; that the portraits were designed, as Ritchie knew, for illustrations of a periodical publication issued by the defendant, and that the latter had sustained damages on the account of Ritchie's default in the premises to \$200, which the defendant claimed to recoup and set-off against any damages to be established by the plaintiff. The answer concluded by praying judgment for damages against the plaintiff of \$200. No reply was put in.

On the trial before Chief Justice Oakley, the defendant, before any evidence was given, asked for a dismissal of the complaint, on the ground that the answer contained a counter claim, which, there being no reply, was admitted; and as the damages of the defendant, as stated in the answer, were equal to the claim made by the plaintiff, there could, it was claimed, be no recovery in favor of the plaintiff. The motion was denied and the defendant excepted. * * * Verdict for the plaintiff. The judgment was affirmed at the general term, whereupon the defendant appealed to this court. The case was submitted on printed points.

DENIO, J. The objections chiefly insisted on by the defendant proceed upon the assumption that his answer contained new

matter constituting a counter-claim, and if he is correct in this, he would be entitled to judgment on the pleadings, for the matters set up in the answer and which are not replied to, would, if admitted on the record, furnish a complete answer and an effectual bar to the cause of action set up in the complaint. But there is nothing in the nature of a counter-claim stated in the answer. There was never any contract between the plaintiff and the defendant; and although the new matter was, if true, very pertinent to preclude the plaintiff from recovering on the demand assigned to him by Ritchie, it had no tendency to show an independent cause of action in favor of the defendant against the plaintiff. Section 150 of the Code of Procedure defines a counter-claim. It must be a claim existing in favor of the defendant against the plaintiff, arising either out of the contract or transaction sued on, or some other contract. Here the defendant had no claim against the plaintiff. If the facts were truly stated, he had grounds for defending himself against the plaintiff's suit, but none whatever for an independent recovery against him. A counter-claim must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant. It is quite obvious that nothing of that nature is stated in this answer. Where there is no counter-claim set up in the answer there is no necessity of a reply, and the failure to put one in is not an admission of anything stated in the answer. In such cases, the answer is considered as put in issue upon a replication denying all the statements of new matter contained in it. (Code §§ 153, 168).

* * *

MARVIN, J. Upon the trial, previous to the introduction of evidence, the defendant moved that the complaint be dismissed on the ground that the answer contained material allegations of new matter, constituting a counter-claim for \$200, and as it had not been controverted by a reply, the allegations must, for the purposes of the action, be taken as true, and the plaintiff's claim being only \$200, the defendant was entitled to a judgment upon the pleadings. This motion was denied, and the defendant excepted. This decision presents the most important question in the case, and I think the defendant has misapprehended the effect of the pleadings. Let us bring here under notice the provisions of the Code which, it is supposed, control the question. The answer is to contain: (1) A general or specific denial of each

A counter-claim must be a cause of action against the plaintiff. Here def. had a counter-claim against plain's assignor, but not against

material allegation of the complaint controverted by the defendant; (2) A statement of any new matter constituting a defence or counter-claim. (Code § 149.) The counter-claim must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment may be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) In an action arising on contract, any other cause of action arising on contract, and existing at the commencement of the action. (§ 150.) When the answer contains new matter, constituting a counter-claim, the plaintiff may, within twenty days, reply to such new matter, denying generally or specifically each allegation controverted by him, &c. (§ 153.)

By § 168, every material allegation of new matter in the answer, constituting a counter-claim, not controverted by the reply, shall for the purposes of the action be taken as true.

A good cause of action was set forth in the complaint, and the defendant, by his answer, put in issue the material allegations of the complaint. The new matters pleaded did not dispense with the necessity of trying the issues formed directly upon the complaint. The defendant did not, and does not now claim that the new matter in the answer showed that the plaintiff had no cause of action, but he claimed that the new matter showed that he, the defendant, had a cause of action or counter-claim against Ritchie, the assignor, in which his damages were equal to the damages claimed by the plaintiff, and that when these damages were set-off or recouped, they left the plaintiff without any right to damages, and that therefore his complaint should be dismissed. This position cannot be sustained. The new matter stated constituted in no sense a set-off. It constituted, if applicable to the case made by the complaint, that is, if it related to the same contract or employment stated in the complaint, a defence upon the ground of failure on the part of Ritchie to perform the agreement. A set-off could in no way arise out of such failure. Did the answer, in which the defendant proposed to recoup and set-off his damages, state facts authorizing a recoupment, or facts involving the doctrine of recoupment in any wise? Clearly not. The facts, assuming that the pleader intended them to apply to the cause of action stated in the complaint, did not involve the

doctrine of recoupment in any form. They showed a special agreement with Ritchie in relation to the engraving, and a failure on his part to perform the agreement, whereby the defendant alleges that he sustained damages. He had never received the engravings. If the facts stated were true, then he had a good cause of action against Ritchie for damages for a breach of the special agreement, but Ritchie had no cause of action against him. In short, the very facts which would give the defendant a cause of action against Ritchie for damages for a breach of the agreement, would show that Ritchie never had any cause of action against him, and there would be nothing out of which to recoup his damages. Recoupment always implies that the plaintiff had a cause of action, but the defendant alleges that he too has a cause of action growing out of a breach of some other part of the contract upon which the action is founded, or for some other cause connected with the contract, and it is in the nature of a cross action. Under the former system of pleading the defendant could not make the defence by a special plea in bar, as it was a rule that such plea must state facts forming a bar to the action, whereas recoupment in its very nature admitted the plaintiff had a cause of action. (Nichols v. Dusenbury, 2 Comst., 284.)

The counter-claim of the Code is undoubtedly broader and more comprehensive than set-off and recoupment. It authorizes a resort by the defendant, to causes of action by way of defence, other than set-off or recoupment. It has attempted, however, to limit and define the defendant's rights. It clearly authorizes set-off and recoupment, and I had no doubt they were authorized by the first Code, under the word defence, in the section relating to the answer. However that was, it is clear they are authorized by the amendments of 1852, and something more. By the second subdivision of § 150, in an action arising on contract, the defendant may avail himself by way of defence of any other cause arising on contract, and existing at the commencement of the action. It is not claimed by the defendant that this provision has any application to the present case. It is claimed that the plaintiff, as assignee of the demand, took it subject to all equities to any set-off or right of recoupment which the defendant had, and this claim is undoubtedly well founded. As we have seen, the defendant had no right of set-off, recoupment, or cause of action against this plaintiff, who by becoming assignee did not subject himself to a cause of action existing against his assignor

so as to have judgment against him for damages. If the provision of the Code just cited, should be construed as authorizing a defendant, when sued by an assignee in an action on contract, to avail himself of any other cause of action on contract against the assignor, so far as to satisfy or compensate the damages in the action by the assignee against him, it would not benefit the defendant in this case. Here the facts stated in the answer related to the same engagement or contract, upon which the plaintiff's action was founded, and if the plaintiff had a good cause of action, the defendant had none. If the plaintiff, as assignee of Ritchie, had no cause of action, then the defendant had no cause of action against Ritchie, which he could use against the plaintiff. In short, it was necessary to try the issue joined by the denial in the answer, and upon the trial of that issue all the rights of the defendant in this action could be protected. If Ritchie failed to perform his agreement the plaintiff could not recover, and the defendant then, if he had sustained damages by a breach of the agreement by Ritchie, could bring his action against him. The facts stated in the answer did not constitute a counter-claim, and no reply was necessary to put them in issue. No error, therefore, was committed in refusing to dismiss the complaint. * * *

Judgment affirmed.

McADOW v. ROSS.

53 Mo. 199. [1873.]

VORIES, Judge, delivered the opinion of the court.

This action was brought to enforce a mechanic's lien. The petition charges, that the defendant Ross is indebted to plaintiff in the sum of \$79.32, for materials furnished by plaintiff to said Ross, the particulars of which are filed: that said materials were furnished for a house erected under a contract with said Ross, (describing the house and lot on which it is situated); that said Ross was the contractor of defendant Smallwood for the erection of said house, for which the materials were furnished, and that said Smallwood was the owner and proprietor of said house and lot. * * *

The defendant then, for a further answer and counter-claim,

states, "that on the 29th day of October, 1867, he and said D. M. Ross entered into a contract in writing which is herewith filed, whereby the said Ross promised and agreed to build for this defendant a house of the dimensions in said contract specified, and which was to be finished by the 25th day of November, 1867, in a good and workmanlike manner, and that plaintiff guaranteed in writing, that said Ross should perform and complete said contract according to its said terms, and which is the same house mentioned in the petition, and which guaranty is herewith filed; that this defendant accepted said guaranty, and plaintiff had due notice of said acceptance; that said Ross did not keep nor perform his said contract, but made breach thereof, in that said house was not completed on said 25th day of November, 1867, nor until one month afterwards, whereby defendant was damaged in the sum of fifty dollars, and that the plastering of said house was not put on in a good and workmanlike manner, nor was it done at the time it ought to have been done, but on the contrary, said plastering was put on in so unskillful and unworkmanlike manner, and at a time when it froze, so that all of it fell off, and defendant was compelled to and did employ other persons to put on new plastering, at a great cost, to-wit: at the cost and expense of one hundred and fifty dollars, by reason whereof, defendant says he is injured, and has sustained damage to the amount of two hundred dollars, for which he asks judgment."

The second defence or counter-claim set up by the answer and above copied, was on the motion of the plaintiff stricken out. The grounds of the motion to strike out this counter-claim were, 1st, That it constituted no legal defence to the action, and was inconsistent with the previous defence set up in the previous part of the answer. 2nd. The liability of the guarantor is contingent, and cannot be pleaded as a set-off. 3rd. There is no mutuality of indebtedness between plaintiff and defendant Smallwood.

The court sustained this motion, and struck out from the record said part of said answer, and the defendant excepted.

A trial was afterwards had and judgment rendered against the defendant Ross, for the debt named in the petition, and subjecting defendant Smallwood's house, named in the petition, to sale for the payment of the judgment.

The defendant Smallwood, then filed his motion for a new

trial for the following reasons: 1st. The court erred in striking out part of defendant's answer, and because the court erred in refusing to declare the law to be as asked for by the defendant.

This motion being overruled, the said defendant excepted and has appealed to this court. * * *

It is next insisted by the respondent, that the matter set up in this answer as a counter-claim fails to show any mutuality of indebtedness between the plaintiff and the said defendant, and that it was, therefore, properly stricken out. The respondent seems to make no distinction between what is denominated a set-off under our statute, and a counter-claim. It is provided by the first section of Ch. 125, Wag. Stat., 1273, that "If any two or more persons are mutually indebted in any manner whatever, and one of them commence an action against the other, one debt may be set-off against the other, although such debts are of a different nature." Now it is admitted, that this statute only permits a set-off to be pleaded where there are mutual debts, and under its provisions unliquidated damages could not be set off against one who brought suit to recover on a demand against the other; but the statute, authorizing counter-claims to be set up by a defendant, is very different. The statute in such case is specific, and it seems that but little room is left to misunderstand its provisions or meaning. By the 12th and 13th sections of Ch. 5 of the statutes of this state (Wag. Stat., 1015, 1016), it is provided as follows: "The answer of the defendant shall contain: First, a special denial of each material allegation of the petition controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; second, a statement of any new matter constituting a defence or counter-claim, in ordinary and concise language without repetition."

Second—"The counter-claim mentioned in the last section must be one existing in favor of the defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action: First, a cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action; Second, in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." By these two sections it will be seen, that it is not required that a counter-claim should be a liquidated demand, nor is it required

that there should be any mutual indebtedness existing between the parties, but if the cause of action shall arise out of the contract, or transaction set forth in the petition as the foundation of the plaintiff's claim, or is connected with the subject of the action, it will be a good counter-claim, whether the damages claimed are liquidated or not. The first question to be considered is, could a several judgment be rendered upon this counter-claim against the plaintiff in this case, and in favor of the defendant. It requires no argument to show that the defendant could have a several judgment against the plaintiff on this guaranty if his case were made out by evidence. There is the breach of this guaranty, set up by the defendant as a counter-claim connected with the subject of the action. The subject of the action, so far as it concerns the plaintiff and the defendant Ross, is the material furnished to Ross, to recover for which the suit is brought; but as between plaintiff and defendant Smallwood, the subject of the action is the lien attempted to be enforced against Smallwood's house, growing out of the fact that the plaintiff has furnished material, which has been used in the building of the house, and the very house that the plaintiff has guaranteed shall be well built and constructed by a time named in the contract guaranteed by the plaintiff. Now the plaintiff has bound himself by his contract of guaranty, that this house shall be completed by the 25th of November, in a good and workmanlike manner and has furnished part of the material to be used in the erection of the house; has sued for this material; is asking for a judgment authorizing the sale of the house, which he agreed should be completed, but is not; and shall it be said that this defendant must have his house sold to pay for the lumber that has gone into its construction, and afterwards bring an action against the plaintiff to recover damages for the failure to complete the very house sold by plaintiff? It seems to me that this is one of the cases intended to be covered by the language of the law, that is, this counter-claim is "connected with the subject of the action." As before stated, the subject of the action, as it affects Smallwood, is the material furnished by plaintiff, and used in the erection of the house belonging to Smallwood, which creates a lien on the house, in the erection of which the material was used. The counter-claim grows out of the failure to properly erect and finish the very house, in which the material was used, for which the lien is attempted to be enforced. Hence, while

the counter-claim does not arise out of the contract, or transaction, set forth in the petition as the ground of action as against the defendant Ross, it is connected with the subject of the action, so far as it is attempted to sell the house by virtue of the mechanic's lien. (*Jones v. Moore*, 42 Mo., 413.) In the case here referred to, Judge Holmes, in delivering the opinion of the Court, refers to *Tiffany & Smith*, New York Practice, for a definition of what constitutes a counter-claim, under a statute in the exact language of our statute on the same subject. It is there stated, that a counter-claim "may be set up, where it is a cause of action arising out of the contract, or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or is connected with the subject of the action, or in case the cause of action in the complaint arises on contract, then any other cause of action, also arising on contract, and existing at the commencement of the action in favor of the defendant and against the plaintiff, may become the subject of a counter-claim." This to my mind is the only proper construction of the statute. The first clause, in the section referred to, embraces cases where the counter-claim arises out of the contract or transaction set forth in the petition, or where the counter-claim is connected with the subject of the action; in such cases, it makes no difference whether the damages claimed by the counter-claim are liquidated damages or not. If the claim be for a debt or damages growing out of the subject of the action, or arise out of the transaction set forth in the petition as a ground of action, it is enough. The second clause of the statute provides for cases where the plaintiff's action arises exclusively upon a contract, in which case a cause of action arising also on contract in favor of the defendant and against the plaintiff, which existed at the commencement of the action, may be set up as a counter-claim in the action. It is true, that the learned judge in his opinion in the case of *Jones v. Moore*, above referred to, seems in his argument to hold, that the cause of action must not only arise out of contract to be set up as a counter-claim in an action founded upon contract, but that it must also grow out of the same transaction; but it was not necessary to consider that point in the case then under consideration, and the learned judge evidently inadvertently confounded the two clauses in the section of the statute referred to. The statute is plainly the other way, and has been so construed by the courts of New York, where the construction of these

clauses of the statute seems to have been well considered. (Tiff. & Sm. N. Y. Pr., 378, and cases there cited; *Curtis v. Barnes*, 30 Barb. N. Y. R. 225.) In this last case the parties mutually submitted a matter to arbitration, and bonds to abide the decision of the arbitrators were mutually executed and delivered, and after the hearing had commenced, but before the same had been completed, one of the parties revoked the submission, and brought an action against the other party to recover the claim so submitted. It was held, that in such case the defendant may recover, by way of counter-claim, the damages sustained by him by reason of the revocation of the submission. It will be seen that the damages in the case above stated were wholly unliquidated, but were still admitted as a counter-claim. The cases referred to by the plaintiff are all cases where the matter set up by the defendant had been set up as an off-set, or was wholly considered under the law concerning off-set, which is very different from the law authorizing a counter-claim. The law, authorizing one debt to be set off against another, requires the debts so set off to be mutual debts existing between the parties, which excludes the idea of unliquidated damages, and is altogether different from a counter-claim, and each defence being governed by the particular statutes relating thereto. (*Spencer v. Babcock*, 22 Barb. N. Y. Rep. 326, above referred to.)

In the case under consideration, if the action against defendant Smallwood is to be considered an action founded on the contract by which the lumber and material was sold to Ross, then Smallwood can by the statute set up as a counter-claim any cause of action also growing out of a contract, which existed at the commencement of the action, in his favor and against the plaintiff. If on the other hand the cause of action, as against defendant Smallwood, grows out of the remedy given plaintiff by the statute to enforce a lien against the property, because the plaintiff has furnished material, which has been used in the erection of, and now constitutes a part of, Smallwood's house, then as the counter-claim is for a breach of the contract to build or erect the same house, it is connected with the subject of the action, and in either case may be pleaded as a counter-claim, or defence as counter-claim to the action.

The counter-claim in this case was not pleaded with as much certainty and particularity of averment as is desirable in technical pleadings, but we think it is in substance good, and ought not

to have been stricken out. The judgment will therefore be reversed.

Judges ADAMS and NAPTON not sitting, the other judges concurring, the judgment will be reversed and the cause remanded.

GILLESPIE v. TORRANCE.

25 N. Y. 306. [1862.]

Action upon a promissory note against the indorser only. Defence that the indorsement was for the accommodation of the maker; that the note was one of several given for oak timber sold to the maker by the plaintiffs; that the timber was a raft in the Hudson river, opposite the city of New York, and that, on making the sale, the plaintiffs produced certificates of inspection showing that there were 29,441 feet of first quality oak, for which Van Pelt, the maker of the notes, agreed to pay $27\frac{1}{2}$ cents per foot, and 5,523 feet of second quality or refuse oak, for which Van Pelt agreed to pay $13\frac{3}{4}$ cents per foot; that, by the usage of the timber trade in New York, the seller is deemed to warrant that the timber sold corresponds in quantity and quality with the description in such inspection certificates; that Van Pelt gave his notes, indorsed by the defendant, for various sums, amounting in the aggregate to \$9,000, the price of the timber as computed from the inspection certificates, and all of which notes had been paid except the one in suit; that after the delivery of the timber it was discovered that the inspection certificates were erroneous in this, that of the timber of the first quality, there was 15,000 feet less than the certificate stated, and an equal excess in the refuse timber; that if the prices had been correctly computed according to the fact, instead of being computed according to the certificate, it would have amounted to less than \$5,000; that the plaintiffs had, therefore, been overpaid, and there was no consideration for the note in suit. On the trial, the judge, under exception by the defendant, excluded evidence as to the quantity of timber of the different qualities; declined to permit an amendment of the answer alleging an express warranty; and excluded

evidence of the usage set up in the answer, making a sale by certificate equivalent to a warranty. The other facts stated in the answer were substantially proved or admitted. The plaintiffs had a verdict and judgment, which having been affirmed at general term, the defendant appealed to this court.

SELDEN, J. The defence in this case is not founded on a failure of consideration of the note, otherwise than by a defect in the quality of the timber, for which it was given. That being so, if there was neither warranty nor fraud in the sale of the timber, the defect in quality constitutes no defence. (*Seixas v. Woods*, 2 Caines, 48; *Sweet v. Colgate*, 20 John., 196; *Welsh v. Carter*, 1 Wend. 185; *Johnson v. Titus*, 2 Hill. 606.) The answer does not allege fraud in the transaction, and unless it shows a warranty of the quality of the timber, it presents no defence to the note, either partial or total. The argument of the appellant's counsel, to maintain the position that the defence rested upon a failure of consideration, and not upon a claim for damages on a breach of warranty, is very ingenious; but the answer and the proof show that all the timber contracted to be delivered to Van Pelt, and for which the notes were given, was in fact delivered, and the real ground of complaint is, that a much larger proportion of it than was shown by the inspector's certificates, upon the faith of which, the purchase was made, proved to be of inferior quality. The law being well established that such defect of quality, in the absence of fraud or warranty, constitutes no defence to the note, or to any part of it, and there being no pretence of fraud, it follows that the defence, if there is any, rests upon a breach of warranty.

The question then arises, whether the plaintiff, an accommodation indorser upon a note given by Van Pelt to the plaintiffs for the timber, can avail himself of a breach of the contract of warranty in regard to the quality of the timber, made by the plaintiffs to Van Pelt, on the sale to him. To decide this question, it is necessary to ascertain the ground upon which such defences, by way of recoupment, as they were denominated prior to the adoption of the Code, now, partially, if not wholly, merged in the much broader term, counter-claim, were admitted. If we regard such defences as resting upon a failure of the consideration of the contract on which the plaintiff's action is founded, then unquestionably the defendant could avail himself of the breach of warranty in this case, because an indorser or surety

may always, where the contract has not been assigned, show a failure, partial or total, of consideration of his principal's contract which he is called upon to perform. But if such defences are regarded as the setting-off of distinct causes of action, one against the other, then it is clear, as will be shown hereafter, that this defendant could not avail himself of such defence.

The subject of the precise ground on which a defendant is allowed to reduce a recovery against him, in an action upon a contract, by alleging and proving fraud or breach of warranty—whether the contract, where there is fraud, is regarded as destroyed, and the recovery had on a *quantum meruit*, or whether the reduction of the plaintiff's claim rests upon a partial failure of consideration, or upon the setting-off of distinct claims against each other—has often been discussed, but without any general concurrence of opinion on the question. (Reab v. McAllister, 4 Wend. 90, et seq.; S. C. in error, 8 id., 109; Batterman v. Pierce, 3 Hill, 171, 177; Ives v. Van Epps, 22 Wend. 155; Nichols v. Dusenbury, 2 Comst. 286; Van Epps v. Harrison, 5 Hill, 66; Barber v. Rose, id., 78; Boston v. Butler, 7 East, 479; Withers v. Greene, 9 How. U. S., 213.)

A careful examination of the subject, I think, must lead to the conclusion, that wherever recoupment, strictly such, is allowed, distinct causes of actions are set-off against each other. This would seem to follow from the right of election, which all the cases admit the defendant has, to set up his claim for damages by way of defence, or to resort to a cross-action to recover them. (Ives v. Van Epps, 22 Wend. 157; Batterman v. Pierce, 3 Hill, 171; Britton v. Turner, 6 N. H. 481; Halsey v. Carter, 1 Duer, 667; Barber v. Rose, 5 Hill, 81; Stever v. Lamoure, Lalor's Supp., 352, note a).

In many cases the defendant's damages would exceed the amount of the plaintiff's claim, which shows conclusively that such damages do not rest upon a mere failure of consideration. Where there is fraud, the party deceived, on discovering the fraud, may rescind the contract; but if he does not do that, the contract on his part remains entire, not broken and not modified, and he is bound to perform it fully according to its terms; he has, however, arising from the fraud, a distinct cause of action, the amount of which he may set off against any liability on his part growing out of the transaction in which the fraud was perpetrated. As was said by Bronson, J., in Van Epps v. Harrison:

“When sued for the price, the vendee may in general *recoup* damages; but while he retains the property he cannot treat the contract as wholly void, and refuse to pay anything. By retaining the property, he *affirms the validity of the contract*, and can be entitled to nothing more than the damages which he has sustained by reason of the fraud.” The same principle is applicable to cases of warranty, except that the breach of warranty gives no right to rescind, unless there is an express contract to that effect. (*Street v. Blay*, 2 Barn & Ad., 456; *Voorhees v. Earl*, 2 Hill, 288; *Cary v. Gruman*, 4 id., 625; *Muller v. Eno*, 14 N. Y., 597; *Thornton v. Winn*, 12 Wheat., 183; *Lattin v. Davis*, Lalor’s Supp., 16.) In ordinary cases of breach of warranty, therefore, both contracts remain binding to their full extent, and where recoupment is allowed, damages for a breach on one side are set off against like damages on the other side. The “cross-claims arising out of the same transaction compensate one another, and the balance only is recovered.” (8 Wend., 115; 22 id., 156; 3 Hill, 174; 2 Comst. 286.)

It has always been optional, as is suggested above, since the doctrine of recoupment has gained a foothold in the courts, with a party who has sustained damages by fraud or breach of warranty in the purchase of the goods, when sued for their price, to set off or recoup such damages in that action, or to reserve his claim for a cross-action; and when he elected to recoup he could not, under the Revised Statutes, have a balance certified in his favor, nor could he maintain a subsequent action for such balance. (*Sickles v. Pattison*, 14 Wend., 257; *Batterman v. Pierce*, 3 Hill, 171; *Wilder v. Case*, 16 Wend., 583; *Stever v. Lamoure*, Lalor’s Supp., 352, note a; *Britton v. Turner*, 6 N. H., 481.)

Under the Code of Procedure, doubtless a balance might be recovered. (Code, §§ 150-274; *Ogden v. Coddington*, 2 E. D. Smith, 317); but the right of election to set up a counter-claim in defence, or to bring a cross-action for it, still exists. (*Halsey v. Carter*, 6 Duer., 667; *Welch v. Hazleton*, 14 How. Pr. 97.)

Now it is not easy to reconcile with these established principles, the right of the defendant in this suit to avail himself of the claim which Van Pelt may have against the plaintiffs on a breach of warranty. 1. Such damages constitute a counter-claim, and not a mere failure of consideration, and not being due to the defendant, cannot be claimed by him. (Code, § 150; *Lemon v.*

Trull, 13 How. Pr., 248; 16 id., 576, note.) 2. Van Pelt has a right of election whether the damages shall be claimed by way of recoupment in the suit on the note, or reserved for a cross-action. The defendant cannot make this election for him. 3. If the defendant has a right to set up the counter-claim, and have it allowed in this action, it must bar any future action by Van Pelt for the breach of warranty; and as no balance could be found in defendant's favor, he might thus bar a large claim in canceling a small one. If the right exists in this case, it would equally exist if the note was but \$100 instead of \$1,800. 4. Supposing the other notes given for the timber to have been indorsed by different persons, for the accommodation of Van Pelt, and all to remain unpaid, each of the indorsers would have the same rights as the defendant. If they were to set up the same defence, how would the conflicting claims be reconciled?

In the case which was shown on the trial, there would seem to be a strong equity in favor of the defendant to have the note canceled or reduced, by applying towards its satisfaction the damages which appear to be due to Van Pelt for the breach of warranty. It is, however, an equity, in which Van Pelt is interested to as great, and possibly to a greater, extent than the defendant, and cannot be disposed of without having him before the court, so that his rights, as well as those of the defendant, may be protected. That remedy may be open to the defendant still, notwithstanding the judgment; especially if the insolvency of the parties renders that course necessary for his protection. (14 Johns., 63, 17 id., 389; 2 Cow., 261; 2 Paige, 581; 6 Dana, 32; 8 id., 164; 2 Story's Eq. Jur., §§ 1446, a. 1437.) My conclusion is, that the court below was right in holding that the defendant could not set up the breach of warranty in defence, partial or total, to the suit on the note; and as the warranty presented the only ground on which there could be a claim of defence under the answer, there is no necessity for considering the other questions presented in the case.

All the judges concurring.

Judgment affirmed.

RITCHIE v. HAYWARD.

71 Mo. 560. [1880.]

HOUGH, J. This was a suit to recover the value of 600 gunny sacks alleged to have been wrongfully converted by the defendants to their own use. The defendants admitted that the sacks came into their possession, and that they had not returned the same, and set up by way of counter-claim that the plaintiffs, at the time named in the petition, agreed to sell and deliver to the defendants, on board a steamboat at Muscatine, Iowa, for transportation to Hannibal, Mo., which was then the defendants' place of business, 1,046½ bushels of choice peach-blow potatoes in gunny sacks, at the price of sixty cents per bushel, the said sacks to be returned by the defendants to the plaintiffs; that, in consideration of said agreement, and relying upon the honesty and good faith of the plaintiffs, the defendants then and there paid to the plaintiffs, in advance, the sum agreed to be paid for said potatoes, to-wit: \$627.90; that the potatoes delivered by the plaintiffs under the said contract were much inferior in quality to the potatoes paid for, and agreed to be delivered, and were delivered in the same sacks, to recover the value of which the present suit was brought; that, by reason of the failure of the plaintiffs to comply with their contract, the defendants had been damaged in the sum of \$141, for which sum they prayed judgment.

That portion of the defendants' answer setting up a counter-claim was, on motion, stricken out by the court, on the ground that a counter-claim founded upon a contract could not be pleaded to an action founded on a tort. This ruling of the court has been assigned as error. The counter-claim allowed by the statute must be one existing in favor of the defendant and against the plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: First, a cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action; second, in an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. R. S. § 3522.

The counter-claim pleaded by the defendants, if it be such as the statute recognizes, must fall within the first class. If the facts stated by the defendants be true, they certainly have a cause of action against the plaintiffs. It is not, however, a cause of action arising out of any contract set forth in the petition, for no contract is therein set forth. The facts set forth in the petition are that the defendants came into the possession of certain sacks belonging to the plaintiffs and wrongfully converted them to their own use. These facts constitute in a legal sense a "transaction," which is a more comprehensive term than "contract." *Xenia Bank v. Lee*, 7 Abb. Pr. 372. The details of the transaction, the evidential facts, are not stated, but the ultimate facts only, those which will entitle the plaintiffs to relief, when established by other facts proved at the trial. It is plain, however, that the word "transaction" as employed in the code cannot be restricted to the simple statement of the wrong complained of by the plaintiff, for it would seem to be impossible that a cause of action could accrue to the defendant out of an injury inflicted by him upon the plaintiff. It must be held to include, therefore, all the facts and circumstances out of which the injury complained of by him arose, and if these facts and circumstances also furnished to the defendant a ground of complaint, or cause of action, against the plaintiff, the defendant will be entitled to present such cause of action as a counter-claim, showing by proper averments that it is a part of the same transaction which is made the foundation of the plaintiff's claim. In this view of the case, it is immaterial what form of action is adopted by the plaintiff. As is said by Mr. Pomeroy in his treatise on remedies, "Whenever the facts are such that an election is given to the plaintiff to sue in form either for a tort or on contract, and if he sues on contract the defendant may counter-claim damages for the breach of that contract, the same counter-claim may also be interposed when the suit is in the form for the tort; the facts being exactly the same in both phases of the action, the counter-claim would clearly arise out of the real transaction which was the foundation of the plaintiff's demand." § 788. Had the plaintiffs sued on the contract set up by the defendants, no possible objection could have been made to the defendants' counter-claim. The statute, in our opinion, preserves their right to set it up, although the plaintiffs have elected to sue for a conversion of the sacks, and not for a breach of the contract to return them. *Vide*

McAdow v. Ross, 53 Mo. 199. The judgment will be reversed, and the cause remanded. The other judges concur.

DEITRICH v. KOCH.

35 Wis. 618. [1874.]

LYON, J.: The plaintiff seeks by this action to procure the discharge of two certain judgments recovered against him in the year 1863, and he states in his complaint the facts which he claims entitle him to relief. The portion of the answer demurred to does not controvert the right of the plaintiff to have the judgment discharged. The allegations thereof relate exclusively to the invalidity of the deed of May 9th, 1870, which is the subject of the counter-claim contained in the answer. This portion of the answer is pleaded both as a defence and a counter-claim, and is demurred to as not stating a defence to the action or a good cause of action by way of counter-claim.

It is very clear that, as distinguished from a counter-claim, the portion of the answer demurred to fails to state facts constituting a defence to the action. Conceding, for the purposes of the case, that, were an action brought by the other heirs of Carl and Margarethe Deitrich against the plaintiff to annul the deed of May 9, 1870, the facts stated in the answer are sufficient to entitle the plaintiffs in such action to the relief demanded, we are brought to consider whether such cause of action is a proper counter-claim to this action. If it is not, the answer is demurrable; for a demurrer lies to an answer containing a counter-claim, when it appears upon its face that it does not constitute a counter-claim to the action. R. S., ch. 125, Sec. 16. (Tay. Stats., 1441.)

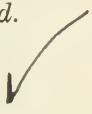
The term *counter-claim*, of itself, imports a claim opposed to, or which qualifies, or at least in some degree affects, the plaintiff's cause of action. It has been held in New York that a counter-claim, to be valid, must to some extent impair, affect or qualify the plaintiff's right to the relief to which he would otherwise be entitled by his action. In *Matton v. Baker*, 24 How. Pr. R., 329, the court says: "A counter-claim, to be available to a party, must afford to him protection in some way against the plaintiff's demand for judgment, either in whole or in part. It

An equitable counter-claim must be a defence to plain. cause of action.

must, therefore, consist in a set-off or claim by way of recoupment, or be in some way connected with the subject of the action stated in the complaint. It must present an *answer* to the plaintiff's demand for relief, must show that he is not entitled, according to law, or under the application of just principles of equity, to judgment in his favor, or to the extent claimed in the complaint." (P. 332.) See also *Pattison v. Richards*, 22 Barb., 143; and *National Fire Ins. Co. v. McKay*, 21 N. Y., 191. In the latter case, Judge COMSTOCK uses the following language: "I apprehend that a counter-claim, when established, must in some way qualify or must defeat, the judgment to which a plaintiff is otherwise entitled." (P. 196.) That the New York courts have held correctly on this subject, we entertain no doubt whatever.

We are unable to perceive that the counter-claim here interposed, if established, can qualify or in any manner affect the plaintiff's cause of action. Should the defendants succeed in proving that the deed of May 9, 1870, ought to be annulled, this fact, of itself, will not affect the plaintiff's cause of action. Upon proper proofs, he will still be entitled to have the judgments against him discharged. It necessarily follows that the cause of action stated in the answer is not available to the defendants as a counter-claim to this action. We conclude that the demurrer is well taken, whether the portion of the answer demurred to be regarded as a defence or a counter-claim, and this renders it unnecessary for us to determine whether, if the allegations of the answer are true, the deed in question ought to be cancelled in some proper proceeding for that purpose. * * *

Judgment affirmed.



Section 5. Union of Defences.

WILLIAMS v. LANGFORD.

15 B. Monroe (Ky.) 566.. [1855.]

This suit was brought by the administrator of Williams against David Langford, (a man of color) who was the slave of Williams until the 23rd of September, 1842, when he was emancipated by deed duly admitted to record. On the day after the date of the deed of emancipation, Langford, with four others

as his securities, executed, and delivered to Williams a covenant by which Langford was bound to pay, in consideration of his being emancipated, to Williams one hundred dollars a year during the life-time of Williams, and if Williams should survive David, then during the natural life of David; payable in equal installments on the 1st of January and the 1st of July in each year, commencing with January, 1843. This suit was brought on the 17th of January, 1852, by the administrator against the surviving obligors in the covenant. It is averred in the petition that Williams died on the 8th of January, 1850, and that the installments due upon the covenant were due and unpaid.

The defendants say in their answer that they have well and truly paid to Williams in his life-time all that he claimed and all that was due upon the covenant. That Langford, a short time before the death of Williams, paid him one hundred dollars, which was accepted by him in full discharge of the covenant sued on, and which was all that was due and claimed by Williams.

The plaintiff demurred to the answer, but the court overruled the demurrer, and the parties went to trial on the issue formed by the petition and answer, and a jury, upon the third trial, found a verdict for the defendants. The plaintiff moved for a new trial, on the ground that the court erred in overruling the demurrer and instructions given to the jury; which motion being overruled, the defendants have appealed to this court.

Judge CRENSHAW delivered the opinion of the Court:

It is manifest that the proof does not show payment of all the installments provided for in the covenant down to the death of Williams. So far, therefore, as full payment or "covenants performed," is relied upon in the answer, the defence was not sustained by the testimony.

The answer sets out three matters of defence, to-wit: payment, covenants performed, and accord and satisfaction by the payment of one hundred dollars a short time before the death of Williams.

The answer was demurred to, because these different matters of defence were not set out in separate and distinct paragraphs, and because the matter of accord and satisfaction was not sufficiently pleaded. However desirable it may be that the requisitions of the Code should be conformed to in all respects, the fact that the different defences were not set out in separate paragraphs is not a cause of demurrer, but of motion to the

court to have the different defences set out in distinct paragraphs.

These different defences, however, were as distinct as set out, as if they had been contained in separate paragraphs; and the demurrer ought not to have been to the whole answer, which contains two valid defences, but only to that part of the answer which relied upon accord and satisfaction. The two defences of payment and covenants performed were well pleaded, but the defence of accord and satisfaction is not well pleaded, and the demurrer ought to have been sustained to this latter defence, had it been to this part of the answer only; but, being to the *whole* answer, which presented some good defences, it was properly overruled. * * *

*Judgment reversed.**

GARDNER v. CLARK.

21 N. Y. 399. [1860.]

'Appeal from the Supreme Court. Action by the assignee of one Addison Gardner for damages for the non-performance of a contract to sell and deliver a thousand bushels of barley, at forty-four cents per bushel. The barley was to be delivered at the store house of one Dunham, who was Gardner's agent for the purpose of receiving and paying for the same, and was to be paid for as fast as it should be delivered.

The defendant's answer set up, among other things, the delivery of a portion of the barley, and that the defendant had always been ready and willing to deliver the residue, according to the terms of the contract; but that Gardner was not ready or willing to receive or pay for the same, according to the terms of the contract. The evidence upon this point, and the decision of the judge at circuit founded thereon, are sufficiently stated in the following opinion.

For a further answer, the defendant averred that, in November, 1847, Addison Gardner, then being the sole person in interest in the contract and damages which are the subject of this suit, commenced an action in the Supreme Court against the defendant

*The same rules as to completeness and incorporation by reference in cases of separate counts in a complaint apply to the statement of several defences in an answer.—*Harmon v. Harmon*, 54 S. C. 100.

by writ of *capias ad respondendum*, commanding the sheriff to have the body of the defendant before &c., at, &c., to answer &c., in a plea therein mentioned; that the defendant was taken and held to answer; "and that, by said writ and taking of said Perkins Clark as aforesaid, a former suit and action at law was commenced by the said Adison against the said defendant for and upon the same identical cause of action in this present action mentioned, and that the said former action is pending and not discontinued." Upon the trial the defendant offered proof in respect to such former action, making his offer in the same terms precisely as those of the answer. The judge, upon the objection of the plaintiff, rejected the evidence, holding that such former action was no defence, and that the defendant, having interposed a defence on the merits, waived his defence of the former action pending, and could not prove his offer. The defendant took exception. The charge and exceptions thereto are sufficiently stated in the following opinion. The jury found a verdict for the plaintiff, and the judgment entered thereon having been affirmed at general term in the fifth district, the defendant appealed to this court.

SELDEN, J.: It is quite certain that the judge at the circuit erred in supposing that, by including a defence upon the merits in the same answer with the defence of a former suit pending for the same cause of action, the defendant had waived the latter defence. A doubt at one time existed, whether the Code had abrogated the rule of the common law which required matters in abatement to be first pleaded and disposed of before pleading in bar to the action; and there were, in the Supreme Court, conflicting decisions upon the subject. The question, however, came before this court in the case of *Sweet v. Tuttle* (4 Kern., 465), where it was held that the Code provided for but a single answer, in which the defendant is required to include every defence upon which he relies to defeat the action. This decision must be considered as settling the question. The only serious inconvenience suggested as likely to result from this construction of the Code is that when an answer embraces both a defence in abatement and in bar, if the jury find a general verdict, it will be impossible to determine whether the judgment rendered upon the verdict should operate as a bar to another suit for the same cause of action or not. It would, however, be the duty of the judge at the circuit, in such a case, to distinguish between the several

defences in submitting the cause to the jury, and require them to find separately upon them. In that way, it is probable that the confusion which might otherwise result may, in most cases, be avoided. At all events, the Code admits, I think, of no other construction.

The judge, therefore, was not justified in rejecting the evidence offered at the trial to show the pendency of a former suit for the same cause of action, upon the ground that this branch of defence had been waived by including in the answer a defence upon the merits. If, however, for any other reason, the evidence was inadmissible, its exclusion should be sustained. The judge gave another reason for rejecting it, viz., that "such former action pending was no defence to this action." * * *

*Judgment reversed.**

COOK v. FINCH.

19 Minn., 407. [1872.]

BERRY, J.: * * * Defendants set up in their answer that the contract, upon which the plaintiffs complain, was "revoked, annulled, and modified." As the contract could not be revoked, and annulled, and also modified, the defences thus set up were inconsistent, and we see no reason why defendants were not properly compelled to elect, upon which they would stand. Con- way v. Wharton, 13 Minn., 160 (Gil. 145). * * *

the plea invalid. Coupled with gen. denial, plea was barred by prior judgment.

BRUCE v. BURR.

67 N. Y., 237. [1876.]

Appeal from an order of the General Term of the Court of Common Pleas, for the city and county of New York, reversing a judgment in favor of the plaintiff, entered upon the report of a referee, and granting a new trial. (Reported below, 5 Daly, 510.)

This action was brought to recover damages for the alleged breach of a contract of sale on the part of the defendants.

The complaint alleged, and the referee found, in substance,

*Accord: Little v. Harrington, 71 Mo. 390, overruling prior cases.

that the defendants contracted to sell and deliver to the plaintiff certain books and publications to the amount of \$2,975.50, and agreed to, and did, receive in payment therefor the promissory note of one O. F. Lund for that amount; that defendants delivered a portion of said books and publications in pursuance of the agreement, but refused to deliver the balance. The defendants, in their answer, claimed to rescind the contract on the ground of fraudulent representations on the part of the plaintiff, as to the solvency of the maker of the note. While the trial was pending before the referee, the defendants, upon motion, were granted permission to serve an amended answer, setting forth an additional defence, and as a counter-claim, a breach of warranty, on the part of the plaintiff, as to the goodness of the note and the responsibility of the maker. On the continuance of the hearing before the referee plaintiff's counsel asked that the defendants be compelled to elect between the defences of rescission and breach of warranty, which request was denied, and said counsel duly excepted. * * *

CHURCH, Ch. J.: There is a legal difficulty, although somewhat technical, in sustaining the decision of the General Term in favor of the defendants, on the ground of a right of rescission founded upon a mutual mistake, within the principle decided in 16 N. Y., 595, and 43 id., 159. That defence was not set up in the answer. A right to rescind on the ground of fraud was set up, but not on the ground of mutual mistake. The evidence was competent upon the issue made, and the right to object to its use upon an issue not made by the pleadings was not, therefore, waived. (54 N. Y., 577.)

The General Term having reversed the judgment below upon the facts, this court has a right to review such decision, and for that purpose, all the facts are before the court for consideration; and if the facts justify a reversal of the judgment, although upon a different theory from that adopted by the General Term, the decision of the latter should be sustained.

One of the defences set up in the amended answer by the special permission of the court was a parol warranty of the goodness of the note and of the solvency of the maker. An objection is made that this defence is not available because inconsistent with the defence of a right of rescission founded upon fraud or mistake. The proper mode of interposing this objection would have been by appealing from an order permitting the defence to be set up, which he could not do. The substantive law makes it impossible for def. to affirm & repudiate both.

to be made. But the objection is not tenable. The Code (§ 150) allows a defendant to put in as many defences or counter-claims as he may have, and the objection of inconsistency between them is not available. The first question is whether this defence was established. * * *

Judgment affirmed.

for plain

BUHNE v. CORBETT.

43 Cal., 264. [1872.]

By the Court, WALLACE, C. J.:

This action was brought to recover the possession of a tract of land situate in the County of Humboldt. The pleadings are verified. The complaint alleges that the plaintiff is the owner in fee of the premises which are described, and that the defendants "on the 2nd day of February, 1870, entered into the possession of the demanded premises above described, and have ever since and still do unlawfully withhold the possession thereof from the plaintiff," etc., concluding with the usual prayer for judgment. The answer is as follows:

"Now comes Joseph Corbett, John Doe (Walter Cutler), and Richard Roe (E. H. Pinney), defendants in the above entitled action, and answering the complaint of the plaintiff herein, on their information and belief deny that on the 1st day of February, 1870, or at any other time, the plaintiff was, or now is, or ever has been, the owner of, or seized in fee, or entitled to the possession of the tract of land described in said complaint, or any part thereof; and deny that on said day, or any other time, the defendants entered into the possession of the same, or any part thereof, or that they ever withheld, or now withhold the possession of the same, or any part thereof, from the plaintiff. Further answering, the said defendants aver that from the year A. D. 1848, down to the 23rd day of May, A. D. 1867, inclusive, the tract of land described in the plaintiff's complaint, was public land of and belonging to the United States, and that on the day last named, and prior thereto, by orders of the President of the United States, one bearing date of that day and another thereto, and in due course of law, the said lands, and the whole thereof, was reserved to the United States for lighthouse purposes, and

There is nothing consistent in this plea. The direct denial denying possession def. 2nd argument time denied alleging possession U. S. govt. The record shows have been stretched on motive

from thence hitherto have remained, and still do remain so reserved for the purposes aforesaid; and that during all of said time, from the year 1848 hitherto, the United States has been and still is the owner in fee and seized of said land and every part thereof.

“That from the 23rd day of May, 1867, hitherto, the United States has continuously occupied and possessed said lands for lighthouse purposes aforesaid, and has erected a lighthouse and light, and other improvements thereon, for the protection and safety of ships and other vessels navigating the waters of the Pacific Ocean, at an expense of about one hundred thousand dollars.

“That the said defendants are the keepers of the light and lighthouse aforesaid, employed for that purpose by the said United States, at stipulated wages, and that they are, as such keepers, the mere servants and employes of the said United States, subject at any and all times to the orders, directions, and commands of the said United States and certain of the officers thereof, and to be discharged and removed from such service and employment.

“That as such lighthouse keepers, and under and in obedience to the orders, directions, and commands of the said United States and officers, these defendants, as such servants and employes for the year last passed, have been and still are in the temporary charge of the light and lighthouse buildings on said land for the sole purpose of keeping the light burning at proper times, and keeping the said lighthouse building in proper repair, all in performance of and in obedience to the duties of keepers as aforesaid, as the same are regulated and prescribed by the said United States and officers.

“The said defendants further aver that they do not now nor have they ever claimed or had any interest in said land or improvements, or any part thereof; and that from the time of the reservation aforesaid the United States by and through these defendants and other of its servants and employes, has continually been and still is in the sole and exclusive possession and occupation of the said land and improvements, and every part thereof.

“Wherefore the defendants pray that they be hence dismissed, and that they may have judgment against the plaintiff for costs of suit.”

At the trial, the plaintiff offered no evidence whatever touching the alleged fact of the possession of the defendants, and, on motion of the defendants, a judgment of non-suit was rendered, on the ground "that the plaintiff has not shown the defendants to have been in the possession of the said premises at the commencement of this action, or at any other time;" and from that judgment this appeal is brought.

We are of opinion that the non-suit was correct upon the pleadings.

The practice Act (Sec. 49) provides as follows: "The defendant may set forth by answer as many defences and counter-claims as he may have. They shall each be separately stated, and the several defences shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished."

It will be observed that the answer here, in the first defence set forth, distinctly denies, "that on said day, or any other time, the defendants entered into the possession of the same, or any part thereof, or that they ever withheld, or now withhold, the possession of the same, or any part thereof, from the plaintiff;" and while it is possible that, under strict rules applicable to verified answers, an objection might have been made to the sufficiency of this denial in a single particular, none such was, in fact, made below, nor has any been pointed out here.

After this denial, the defendants, "further answering," make certain affirmative averments, in the course of which they set up that they are in charge of the lighthouse on the premises as the employes of the United States, etc.; and it is upon the effect of these averments in pleading that we understand the plaintiff to claim that he was relieved from the necessity of proving that the defendants were in possession at the time the action was commenced.

1. Assuming that the defences, as thus pleaded, were inconsistent upon the point of the possession of the defendants, it would not follow that the plaintiff would be at liberty to disregard them, or either of them, at the trial. If he desired to present that question, he should have moved to strike out the one or the other, or applied for an order compelling the defendants to elect as to which particular one of them they would rely upon. (*Klink v. Cohen*, 13 Cal., 623; *Uridias v. Morrill*, 25 Cal., 31.)

2. But even had he by motion presented the question of the

supposed inconsistency of the several defences in the answer, we think that it would not have availed him. A party defendant in pleading may plead as many defences as he may have. If a plea or defence separately pleaded in an answer contain several matters, these should not be repugnant or inconsistent in themselves. But the plea or defence regarded as an entirety, if it be otherwise sufficient in point of form and substance, is not to be defeated or disregarded merely because it is inconsistent with some other plea or defence pleaded. And there is no distinction in this respect between pleadings verified and pleadings unverified. (Bell v. Brown, 22 Cal., 672; Wilton v. Cleveland, 30 Cal., 192.)

We are, therefore, of opinion that the judgment must be affirmed, and it is so ordered.

RHINE v. MONTGOMERY.

50 Mo., 566. [1872.]

ADAMS, Judge, delivered the opinion of the court:

This was an action for assault and battery. The answer sets up three separate defences: First, a denial of the assault and battery; second, that the plaintiff made the first assault, which was repelled by the defendant in self-defence; third, that the defendant was in his own dwelling, and the plaintiff was unlawfully there, and refused to leave, and he used sufficient force to put him out, and only such force as was necessary. The record does not show that any replication was filed to the second and third defences.

The jury found a verdict for the plaintiff, and a motion for a new trial was made and overruled. The court, at the instance of the plaintiff, and against the objections of the defendant, gave several instructions to the jury. But we are only called upon to examine the first instruction, which reads as follows:

“The defendant’s answer admits the assault and battery upon the plaintiff, with all the aggravated injuries to plaintiff, as charged by plaintiff in his petition; and unless the jury shall believe from the evidence in the cause that the defendant was either excusable or justifiable in making such assault and battery, they will find for the plaintiff, and assess to him such dam-

ages against the defendant as under all the circumstances they may think proper, not exceeding \$2,000; and in estimating the damages they may take into consideration the pain, sufferings, and mental anguish and wounded feelings of the plaintiff in consequence of such assault and battery."

Under the pleadings as they stand here, it is difficult to perceive upon what principle this instruction was allowed. It asserts that plaintiff's entire case was admitted by the answer, and under it, all the plaintiff was bound to do was to read his petition to the jury and rest. The court may have acted on the mistaken theory that the positive denial of the trespass was waived by the subsequent supposed additions of the pleas of justification. Our present code of practice, like the old system of pleading, permits several consistent defences to be set up in the same answer. The only question, therefore, is whether these defences were consistent with each other. The three defences amounted in substance to the old pleas of *not guilty*—*son assault demesne*, and *mollitur manus imposit.*

The trespass complained of is an unlawful battery. The defendant's first defence is a denial of the alleged trespass. The second and third defences are justifications of the defendant's acts, and are in no sense express or implied admissions that they were unlawful. The three defences are clearly consistent, both at common law and under our statute. (Nelson v. Brodhack, 44 Mo., 596; Lansing v. Parker, 9 How. Pr., 288.)

But there were no replications to the new matter contained in the defendant's pleas of justification, and under our statute all the material allegations of new matter not controverted by the reply are, for the purposes of the action, to be taken as true. (Wagn. Stat. 1019, § 36.) The instruction referred to erroneously assumed that the new matter had been controverted by the reply. This was obviously a mere oversight, and the replies were, no doubt, unintentionally omitted, and may be supplied at any time by permission of the court before trial.

Judgment reversed and the cause remanded. The other judges concur.

for def.

As a matter of fact, the three pleas are inconsistent. But as he has a denial of an off. of count is made liable to overlook inconsistent than in case of two of pleas standing alone

STEENERSON v. WATERBURY.

52 Minn., 211. [1893.]

COLLINS, J.: On the trial of this action, which was brought to recover for professional services alleged to have been rendered by plaintiff, as an attorney at law, at the defendant's request, the principal question for the jury was as to the power or authority of the defendant's agent to employ the plaintiff. There was a verdict in his favor, and a new trial was granted, on the ground, as appears from a memorandum attached to the order appealed from, that the testimony which was produced to establish the power or authority of the agent to employ the plaintiff was insufficient to charge the defendants with his alleged act. Whatever might be said as to the sufficiency of the evidence to support the verdict, had defendants' motion for a new trial been denied, and an appeal taken by them, it is apparent, on this appeal, that the evidence on the main question was not so manifestly and palpably in favor of the verdict as to justify us in declaring that the learned trial court abused its discretion when making the order appealed from. It must, therefore, be affirmed, and this renders it proper for us to briefly discuss two questions which presented themselves on the first, and which would undoubtedly be raised on the second trial, unless disposed of at the present time.

1. There was a general denial in the answer by which the allegations of the complaint as to the rendition of the services, and that they were performed at the defendants' request, were put in issue, and this denial was followed by a special averment that prior to the commencement of the action defendants had paid plaintiff in full of all demands, including that set forth in the complaint. The position of the plaintiff was, and is, that because of an inconsistency between the general denial and the special plea of payment, the latter controlled, and it stood admitted on the trial that the professional services were rendered at defendants' request. Under our system of pleading, a defendant may set up as many defences as he may have; the only limit to this right being that they must not be inconsistent. Separate and distinct defences are consistent when both may be true, and are only held inconsistent when the proof of one necessarily dis-

general
denial

payment

proves the other. These allegations did not stand opposed to the extent that, if one should be established by testimony, the other would of necessity be proven untrue; for the fact might be that plaintiff's services had been rendered without defendants' request, and yet have been considered and taken into account in a subsequent settlement, at which they paid plaintiff in full of all demands.

There exists no good reason why one should not be permitted to settle a claim for services which he regards as unjust, because no services have been required, without having his act construed to his prejudice.

Order affirmed.

LEAVENWORTH LIGHT & HEATING CO. v. WALLER.

65 Kan., 514. [1902.]

Plaintiff's action was for damages done by the burning of her barn. The petition charged "that the defendant, its officers and agents, thereunto duly authorized and empowered, entered into and contracted with said plaintiff, whereby the said defendant was to put and place lights in said barn for the use of the plaintiff;" that, in putting in the necessary wires, the same were not large enough, nor properly insulated, and were placed carelessly and negligently, so that the injury of which she complains resulted. The answer was first a general denial, "and, for a second and further ground of defence herein, defendant refers to the foregoing part of this answer as part hereof, and further avers that if plaintiff was in any wise damaged or injured as set forth in the petition, which this defendant denies, then the defendant avers that the plaintiff and her agents, by her duly appointed and authorized, so acted and conducted themselves as to contribute to the damage and injury complained of." For reply, the plaintiff filed a general denial. Upon these issues a trial was had, which resulted in a verdict and judgment for the defendant. From it error was prosecuted to the court of appeals, Northern department, Eastern division, where the same was reversed, and the case remanded for further trial. See *Waller v. Heating Co.*, 9 Kan. App., 301 (61 Pac., 327). A second trial was had upon the same pleadings. The defendant then sought

to show by competent evidence that it was not the owner of the electric light plant operating the lights in plaintiff's barn at the time the fire occurred, but that another and separate corporation, from which plaintiff subsequently purchased, was at that time the owner. This evidence was rejected by the court upon the objection of the plaintiff. * * *

CUNNINGHAM, J.: (after stating the facts.) The reasons urged for the exclusion of the evidence are: First, that the same was irrelevant and immaterial, because not within the issues in this case; second, that when the case was in the appellate court, defendant's attorneys admitted in their brief filed in that proceeding in error that the defendant was the owner of the electric lighting plant at the time of the fire.

In support of the first contention, it is urged, first, that the plea of contributory negligence contained in defendant's second defense was in effect an admission that defendant caused the damage complained of; that to deny defendant's negligence is inconsistent with the plea of contributory negligence on the part of the plaintiff; that there could be no contributory negligence on the part of the plaintiff without the antecedent negligence on the part of the defendant. In the language of the defendant in error, "The plea of contributory negligence is in the nature of a plea of confession and avoidance, and if this be true, then the defendant is estopped from denying its identity as the party properly sued." This raises a novel and important question in our practice. It will be observed that the defendant's answer contained a general denial. This, standing alone, would have put the plaintiff upon proof of all of the material allegations in her petition. One of these allegations was that the defendant's negligence was the cause of her injury. She was thereby required to establish not only negligence, but to connect the defendant with such negligence by showing its ownership of the electric light plant at the time of the injury. *Railway Co. v. Searle*, 11 Colo., 1 (16 Pac., 328); *Jackson v. Water Co.*, 14 Cal., 19; *Schular v. Railroad Co.*, 38 Barb., 653; *Greenway v. James*, 34 Mo., 328. This she sought to do in making her case, by introducing evidence that the defendant was the owner of the electric light plant at that time. This denial, standing alone, would not only require this proof at the hands of the plaintiff, but, per contra, permit the defendant to disprove this material matter. *Davis v. McCrocklin*, 34 Kan., 218 (8 Pac., 196). It will be

further observed that the defendant, in its second defense, while still denying generally, says that, if the plaintiff was damaged, then such damage was occasioned by the contributory negligence of the plaintiff or her agents. We do not think this claim inconsistent with the claim that the injury was not committed by the defendant, or occurred through his negligence. The defendant in error cites various authorities in support of her claim. They are strongly stated in a citation from 5 Encyc. Pl. & Pr., pp. 11, 12, as follows: "The plea of contributory negligence is a plea in confession and avoidance, which admits negligence on the part of the defendant, but seeks to avoid liability therefor by alleging that plaintiff was guilty of negligence which contributed to his injury." We are not ready to grant that the authorities cited fairly support the law as thus laid down, though obiter remarks contained in some of them probably do. However, immediately following this quotation is the statement: "But this is not the rule in those states whose codes permit the defendant to set up as many defenses, whether of law or of fact, as he may see fit." Our statute (section 4528, Gen. Stat. 1901) permits the defendant to "set forth in his answer as many grounds of defense, * * * as he may have, whether they be such as have been heretofore denominated as legal or equitable, or both." Notwithstanding this provision, the pleader may not rely in the same plea upon absolutely inconsistent defenses. He can not admit and deny in the same breath. He may, however, adapt his pleadings so as to meet the possible conditions and contingencies of the case that his opponent may prove. He may say: "I was not negligent. I am wholly innocent in that matter. It is possible, however, that you may be able by your indirection or my misfortune to satisfy the jury that I am at fault. If you do, I shall assert that the injury was occasioned through your contributory negligence." Or, he may say, "If there was negligence which was the cause of your injury, I was not its author," and at the same time say, "If you were injured by the negligence of any one, you are not entitled to relief, for you contributed thereto by your negligence." It certainly would be a very great hardship to a defendant who knows that he was not negligent, and knows that the plaintiff was, to compel him, at his peril, to elect which of these defenses, equally good, he should adopt. These defenses are not inconsistent. The truth of either by no means implies the falsity of the other. They may be availed of for

the purpose of presenting the exact facts in a given case. Beyond question, a defendant might take advantage of plaintiff's contributory negligence, should such be developed in the making of plaintiff's case, even though the defendant had pleaded nothing but the general denial. It would be a queer rule that would deprive him of this, had he added to such general denial a plea of contributory negligence. The plea of contributory negligence, standing alone, would be one in avoidance, but it cannot be said to be one in confession, where accompanied by a general denial. In *Railroad Co. v. Hall*, 87 Ala., 708 (6 South., 277, 4 L. R. A., 710, 13 Am. St. Rep., 84), on page 724, 87 Ala., and page 284, 6 South., the law is announced as follows: "A denial of the negligence charged, or plea of not guilty, although pleaded separately, repels all presumption of confession which arises from the plea of contributory negligence when pleaded alone." In *Cole v. Woodson*, 32 Kan., 272 (4 Pac., 321), which was an action for slander, where defendant had denied, and also pleaded the truth of the slanderous words, this court said (page 276, 32 Kan., and page 322, 4 Pac.): "It would certainly be a great hardship to a defendant who had been sued for slander to be required to admit that he had used the alleged slanderous words, when in fact he may never have used them, in order that he may be allowed to show that such words are true. And it would equally be a great hardship to him to be required, in effect, to admit that the words are false and slanderous, when in fact they may be true, in order to be allowed to make the defense that he never used such words. Our statutes do not tolerate any such unjust rules, but allow a defendant to set forth as many defenses as he may have, which in slander cases may be that he did not use the words charged, and also that the words are true. And it makes no difference what the common law may have been, or what may have been decided by courts in other states, where their statutes are different from the statutes of Kansas. The statutes of Kansas must govern in actions originating and instituted within the borders of Kansas. And where they are clear and explicit, we need not look any further." In *Bell v. Brown*, 22 Cal., 671, on page 678, the court, commenting upon the provisions of a statute like our own, upon a right it gives a defendant to set up all his defenses, says: "It is an absolute right given him by law, and the principle is as old as the common law itself. He may fail to prove one defense, by reason of the loss of papers, absence, death, or

want of recollection of a witness, and yet he ought not thereby to be precluded from proving another equally sufficient to defeat the action." In *Treadway v. Railroad Co.*, 40 Iowa, 526, the law is laid down in the syllabus: "An admission in the nature of a confession and avoidance in one count of an answer does not operate to admit matter formerly denied in other counts."

In *Weaver v. Carnahan*, 37 Ohio St., 363, a defendant, when sued, to recover the value of services rendered, may deny that the services were rendered, and also allege that, if rendered, their value was less than the amount claimed. For cases holding analogous views, see 1 Enc. Pl. & Prac., 857. * * *

Judgment reversed.

DERBY v. GALLUP.

5 Minn., 119. [1860.]

ATWATER, J.: Gallup brought an action of trover, in the district court of Ramsey County, against Derby & Day, for the taking and conversion of certain personal property, of which the plaintiff claimed ownership and possession. The complaint alleged the value of the property to be \$2,636, and that the plaintiff had sustained special damages to the amount of one thousand dollars, asking judgment for value and damages.

The answer contained, first, a general and specific denial of each and every allegation in the complaint. Second, for a further defense, the answer alleges, that the defendants were creditors of one C. W. Griggs, and sued out a writ of attachment against him in the United States District Court; that by virtue of said writ, and under the direction of the plaintiffs therein, the marshal of the court did, on the 15th of August, 1859, levy upon certain goods, and take the same into his possession, etc.; that said goods were taken from his possession by the plaintiff by force; and that, on the 18th of August, he levied on certain goods described in the answer; which takings are alleged to be the same as those charged in the complaint. There was a verdict for the plaintiff, on which judgment was entered and motion made to set aside the same, which was denied. Defendants appeal from the order denying the motion and judgment.

The first question presented is, as to the admissibility of the two separate defenses set up in the answer. The judge charged

the jury that the taking was admitted by the pleadings, to which the defendants excepted. If both defenses can stand, it is evident the charge was erroneous, otherwise, it was correct. These pleas are clearly inconsistent with each other. Under the old system of pleading, cases may be found where analogous pleas have been sustained. In *Shuter v. Page*, 11 Johns, 196, *non cepit*, and property in the defendant was pleaded in action of replevin. The pleas were sustained—the court, in its opinion, not deciding the pleas were not inconsistent, but stating that “courts have allowed pleas, in many instances, apparently as inconsistent as those in the present case.” Even under the old system of pleading, it is difficult to perceive how such a plea could be sustained. But the cases in which similar pleas have been sustained have arisen under statutes (so far as we have examined) similar to that of 4 Anne, 16, § 4, which provides that “it shall be lawful for any defendant or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record, with leave of the court, to plead as many several matters thereto as he shall think necessary for his defense.” The code does not authorize such pleading, nor any fictitious pleading; and the decision of this question must depend upon the construction to be given to the provisions of the code on the subject of pleading.

The authorities under the code upon this point are conflicting. Among those sustaining the principle here contended for, see *Lansing v. Parker*, 9 How. Pr. R., 288; *Hollenbeek v. Clow*, id. 289; *Hackley et al. v. Ogmun*, 10 How. Pr. R., 44; *Stiles v. Comstock*, 9 How. Pr. R., 48; and contra, *Roe v. Rogers*, 8 How. Pr. R., 356; *Arnold v. Dimon*, 4 Sandf., 680; *Schneider v. Schultz*, id. 664; *Lewis v. Kendall*, 6 How. Pr. R., 59; *Ormsby v. Douglas*, 2 Abb. Pr. R., 407. It is not difficult to understand how these contradictory decisions have occurred under the code. They are the result, on the one hand, of a desire to adapt the former system of pleading to the provisions of the code, and to recognize the binding force of authorities under that system; and, on the other, to make the present system of pleading conform to the provisions of the code in its spirit, as well as letter, ignoring, if need be, to effect this object, decisions which might have weight under the former system. And I cannot but here remark, that had there been a disposition manifested by all the courts, in the states where the code has been adopted, to co-operate in giving full force and effect to the changes introduced by it, instead of

adhering with such pertinacity to the former system, and hampering the new with restrictions contrary to its manifest intent, the code would have become more effective in the administration of justice, or, at least, its merits and demerits would have been more satisfactorily tested. It may still be an open question whether the system embraced in the code shall prove more successful in eliminating truth from error than that which formerly obtained, but so long as it prevails, it should be administered by the courts in accordance with its letter and spirit, and so as to carry out, as far as practicable, the intent of its framers.

Referring, then, to the code, we find that one of the most important changes effected by it, is the abolition of all fictitious pleading, and requiring facts to be stated, whether as constituting the cause of action, or ground of defense. In regard to the complaint, the principle is stated in direct terms, the plaintiff being required to state "the *facts* constituting the cause of action;" and, although the language in regard to the answer is not precisely the same, yet it is entirely clear that the intent of the code is to allow the defendant to plead only the facts constituting his ground of defense. For it is not to be supposed that any advantage is to be given to the defendant over the plaintiff in pleading, and the answer is required to be verified whenever the complaint is. The paramount object of the change effected by the code is to require truth in pleading. If this could be completely attained much of the cumbrous machinery of courts could be dispensed with, jury trials would no longer be necessary, and nothing would be required save the application of principles of law to the facts stated. But, if absolute truth in pleading be unattainable, courts may at least prevent parties from spreading upon the record pleas which prove their own falsity, or from deriving advantage from such as are inconsistent with themselves. It is true the code provides that "the defendant may set forth by answer as many defenses as he shall have;" but this provision must be understood with the restriction that those defenses must be true—that they must be such as the facts to be proved will sustain. The object of the provision is not to enable the defendant to defeat the action at all hazards, but to afford him the opportunity of pleading such facts as actually exist, or can be proved, constituting a defense. To hold otherwise would be in direct conflict with the manifest intent of this system of pleading, and lead to the most serious abuses.

In the case at bar, the defendants have denied, in the first place, every allegation of the complaint, thus putting in issue both the right of property in the plaintiff, and the taking of the goods by the defendant. This plea, if true, constitutes a perfect defense to the action. The taking of the goods constituted the gist of the action, and from the nature of the case, the defendants must know whether the plea denying the taking was true or false. If true, no other defense was necessary, and even had another or others existed, consistent with this, it would have but encumbered the record with useless issues to plead them, though in such case permissible. But the defendants, in their second plea, expressly admit the taking the goods, alleging them to belong to one Griggs, and justify the taking under process. The only part of this plea, inconsistent with the former, is that in relation to the taking of the property. The allegation that the property belonged to Griggs, and that in regard to the value, are not in conflict with the previous denials. But in regard to the taking, it is obviously impossible that both pleas should be true, and no process of legitimate reasoning can make them appear consistent. If the same weight is to be allowed to the admission, as to the denial, of the taking, it leaves them equally balanced, or, rather, the one would destroy the other, leaving the charge in the complaint undenied. But, in fact, the admission of the taking is entitled to more weight than the denial, for it is a familiar rule of pleading, that each party's pleading is to be taken most strongly against himself, and most favorably to his adversary. And thus, I think, the plaintiff is entitled to the benefit of the admission of the taking, as the pleas stand, and that there is no necessity for a motion to strike out, or to compel the party to elect by which he will abide.

The reasoning by which, in the cases above cited, similar pleas have been sustained, is to my mind entirely unsatisfactory, and ignores the true principles of pleading, as established by the code. The learned justice (Shankland) who delivered the opinion in *Stiles v. Comstock*, has made an able plea for the defendant, and showed, perhaps, that the principle there contended for was recognized under the old system, though his argument seems entirely to overlook the idea that truth is essential to a pleading under the code. He supposes that the plaintiff may *prove* a cause of action which never actually existed, and that the defendant should be permitted to frame his plea to meet such

supposable case, and also to deny the actual existence of the fact alleged. It is, perhaps, sufficient to remark, that general rules of pleading cannot be framed to meet these extreme and exceptional cases; and that, although a case might be supposed where a defendant would suffer injury by the commission of perjury against him, the evil would be far greater to allow him to deny an actual fact, and yet to derive the same advantage from a plea admitting the existence of the fact. I cannot perceive upon what principle this rule of pleading can obtain, unless it be held that the code was designed to furnish the defendant with the means of defeating his adversary, *per fas aut nefas*. We have to some extent recognized the rule here adopted, in *Mason & Craig v. Heyward*, 3 Minn. (182), and *Bergfield v. McClung, etc.*, 4 Minn. (148). * * *

*Judgment affirmed.**

*See, also, discussion of this subject in *Bank v. Carter*, 13 Wash. 281.

CHAPTER V.

THE REPLY.

CODE PROVISIONS:

Reply; what to contain.—Where the answer contains a counter-claim, the plaintiff, if he does not demur, may reply to the counter-claim. The reply must contain a general or specific denial of each material allegation of the counter-claim, controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief; and it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint, constituting a defense to the counter-claim.—*N. Y. Code Civ. Proc.*, § 514.

Judgment upon failure to reply.—If the plaintiff fails to reply or demur to the counter-claim, the defendant may apply, upon notice, for judgment thereupon; and, if the case requires it, a reference may be ordered, or a writ of inquiry may be issued, as prescribed in chapter eleventh of this act, where the plaintiff applies for judgment.—*Ib.* § 515.

Cases where the court may require a reply.—Where an answer contains new matter, constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter. In that case, the reply, and the proceedings upon failure to reply, are subject to the same rules as in the case of a counter-claim.—*Ib.* § 516.

Plaintiff may set forth several avoidances in reply.—A reply may contain two or more distinct avoidances of the same defense or counter-claim; but they must be separately stated and numbered.—*Ib.* § 517.

Reply and demurrer to answer.—The plaintiff may demur to one or more defenses set up in the answer, stating in his demurrer the grounds thereof; and where the answer contains new matter, the plaintiff shall reply to such new matter within such time as the court by rule or otherwise shall require, denying generally or specifically the allegations controverted by him, or any knowledge or information thereof, sufficient to form a belief, and he may allege in ordinary and concise language and without

repetition any new matter not inconsistent with the petition, constituting a defense to the new matter in the answer. To this reply the defendant may demur within three days after the same has been filed.—*R. S. 1889 (Mo.)*, § 607.

Defendant entitled to judgment, when.—If the answer contains a statement of new matter, and the plaintiff fail to reply or demur thereto within the time prescribed by the rule or order of the court, the defendant shall have such judgment as he is entitled to upon such statement; and if the case require it, a writ of inquiry of damages may issue.—*Ib.* § 608.

Replies and demurrers, by what rule governed.—The reply shall be governed by the rules prescribed in relation to answers; and demurrers to the answer or reply shall be governed by those prescribed in relation to demurrers to petitions, where they apply; and when a replication is filed the cause shall be deemed at issue.—*Ib.* § 609.

PUGET SOUND IRON CO. v. WORTHINGTON.

2 Wash. Ter., 472. [1885.]

TURNER, J.: The action in the court below was brought by the appellees against the appellant for the breach of a contract described as follows:

“Said defendant entered into a contract with plaintiffs by the terms of which it was, among other things, mutually agreed to the effect that said defendant should cut, cord, and furnish to the plaintiffs, within a reasonable time thereafter, all the cordwood on the lands known as the ‘Bishop and Johnson land,’ situate at Irondale, Jefferson County, aforesaid, for the purpose of the whole thereof being made and converted into good and merchantable charcoal by plaintiffs; and said defendant further agreed to pay the plaintiffs eight cents for each and every bushel of said charcoal delivered by plaintiffs to defendant, and to charge plaintiffs for said wood at the rate of one dollar for every forty bushels of charcoal delivered as aforesaid, and no more.”

The complaint alleges performance on the part of the plaintiffs with all the conditions of the contract, and alleges as a breach by the defendant the refusal to deliver the balance of the

wood described in the contract, some 4,000 cords, to be made into charcoal by the plaintiffs.

Here defendant in its answer denies all the material allegations of the complaint. For an affirmative defence it sets out in *haec verba* a written contract entered into between the plaintiffs and itself, on the day alleged in the complaint as the day on which the contract sued on was made, whereby it was to deliver to the plaintiffs, to be made up into charcoal, 10,000 cords of wood, more or less; alleges that no other contract than the contract thus set out was ever entered into between plaintiffs and itself, and alleges that it has fully performed the conditions of said contract by delivering to the plaintiffs some 13,000 cords of wood.

The plaintiffs replied to the answer as follows:

"That at the time of the making of the said written agreement, and thereafter, it was mutually agreed by and between the plaintiffs and defendant, in addition to said writing, and as a part of the contract sued on in this action, that defendant should furnish plaintiffs, within a reasonable time, and plaintiffs should manufacture into charcoal, and deliver at the price named in the said writing, all the cord-wood then cut and corded, or standing, or lying, or being upon all the lands known as the 'Bishop and Johnson lands,' situated at Irondale, aforesaid."

The defendant demurred to this reply, which demurrer was overruled. The parties then went to trial, and the trial resulted in a verdict for plaintiffs. The cause is here by appeal under the act of 1883.

The first matter assigned by the appellant as error which we shall notice is the failure of the court to sustain the demurrer to the reply. The appellant attacks the reply as a departure in pleading. The appellees attempt to sustain it as a new assignment of the contract described in the complaint. In our judgment, it is neither. It is not a departure, because it is perfectly consistent with the complaint. It is not a new assignment, because there is no such thing as a new assignment, as that term was understood at common law, under our system of pleading. If, under our system, it becomes necessary for a party to restate his cause of action, he may do so by amendment. The reply must traverse, or confess and avoid. Code, § 86.

But the reply was, for the purposes of the action, wholly impertinent. It should have been stricken from the cause. It was

no more impertinent, however, than the affirmative defence which it professed to reply to. Under our system of pleading the technical learning of the common-law pleader is of but little account. The plaintiff is required to state his cause of action with sufficient particularity to apprise the defendant of its true character. The defendant in his answer must deny the facts alleged in the complaint, or he must state new matter in avoidance or by way of counter-claim. If these several pleadings are not accurate and full, the party required to take the next step may have them made more definite and certain before he proceeds. With these fundamental principles kept in view, it would seem easy for a person of ordinary intelligence to frame correct pleadings. In this case the defendant denied all the matters averred in the complaint. His affirmative defence cannot be construed as doing more; neither the supposed affirmative defence, nor the reply to it, add anything to the issue, which was fully and completely made up when the defendant denied that it made the contract described in the complaint. It added nothing to that denial to set out affirmatively the version of the contract which defendant insisted was the true one. Seeking no affirmative relief, it made no difference what other contract it had made with the plaintiff, if it had not made the one sued on. It is a matter of surprise to the court that counsel of so much ability and industry as those engaged in this cause should have overlooked these plain and obvious principles of code pleading. The court properly overruled the demurrer to the reply.

Judgment affirmed.

for plain.

CAMPBELL v. BANNISTER.

79 Ky., 205. [1880.]

Chief Justice COFER delivered the opinion of the court.

This was an action for slander in charging the plaintiff with the crime of arson. The defendant, by his answer, admitted that he spoke the words charged, but averred they were spoken to his wife in the privacy of his family, and were accidentally overheard by another person in the house, but not known to be within hearing, and thus, without having been so intended by him, became public. And he further averred that this was done without

malice, and was the wrong and injury complained of in the petition.

In his reply, the plaintiff averred that it was not true that the defendant spoke the words complained of under the circumstances stated in the answer; and he also averred that the defendant had often spoken the words, or the substance of them, in the presence of divers persons.

With the pleadings in this condition, the parties went to trial, which resulted in a verdict for the plaintiff for one cent in damages, and his motion for a new trial having been overruled, he has appealed.

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then { One whose house has been set on fire may communicate to his family, under proper precautions, and without malice, his suspicions as to who the incendiary is, and he will not be responsible to a person falsely accused for so doing.

If he be sued, the fact that he repeated the accusation to others may be given in evidence, for the purpose of proving that the communication to his family was malicious, and that was the only purpose for which evidence of other publications of the defamatory words was admissible in this case.

The plaintiff, having traversed the allegations of the answer, had no right to recover for any other publication than that admitted in the answer.

If that was not the publication for which he sued, he should have filed an amended petition, setting forth his cause of action more minutely and circumstantially, and could not, by anything contained in his reply, draw the defendant away from the particular publication admitted in the answer. This could only be done by a new assignment.

A new assignment is not, properly speaking, a replication, since it does not profess to reply to anything contained in the defendant's answer, but throws aside as useless a previous pleading, or, rather, re-states, in a more minute and circumstantial manner, the cause of action alleged in the petition which the defendant, through mistake or design, has omitted to answer. It is, therefore, in the nature of a new petition, or, rather, it is a more precise and particular repetition of the matter contained in the original petition, so as to indicate that the plaintiff is suing for a matter other than that to which the answer relates. (Chitty on Pl., p. 653.) * * *

Judgment reversed.

for def.

SCHOOL DISTRICT v. CALDWELL.

16 Neb., 68. [1884.]

REESE, J.: This action was brought by the plaintiff in the district court of Adams county, to restrain the defendants from selling the real estate described in the plaintiff's petition. The facts are as follows: On the eighteenth day of October, 1877, the plaintiff recovered a judgment against W. W. Fitzpatrick, J. M. Fitzpatrick, and J. S. McIntyre, in the district court of Lancaster county, for the sum of \$1,053.33, and on the tenth day of December of the same year, a transcript of said judgment was filed in the office of the clerk of the district court of Adams county. On the thirteenth day of January, 1878, J. S. McIntyre, one of the judgment defendants, sold and conveyed the real estate in dispute to A. F. Boston, who, on the fourteenth day of November, 1879, conveyed it to R. A. Batty, and he afterwards conveyed it to the plaintiff. On the fourteenth day of August, 1882, an execution was issued on said transcript and levied on said real estate as the property of said J. S. McIntyre, the sale of which the plaintiff enjoined. Upon trial in the district court the injunction was dissolved and the case dismissed. The plaintiff appeals to this court.

The petition alleges that said judgment is not a lien on said real estate, for the reason that the instrument purporting to be a transcript of the judgment rendered by the district court of Lancaster county does not show that the court had any jurisdiction over the said J. S. McIntyre, and that the pretended judgment was not docketed on the court records of Adams county, nor entered in the general index of judgments of said court, was not a lien on the real estate of the said J. S. McIntyre, and that the plaintiff purchased said property without any knowledge of the existence of said judgment. To this petition the defendants answered, setting up their judgment, alleging it was still in force, the filing of the transcript, that it was properly indexed, and that at the time of the filing of said transcript the said McIntyre was the owner of the property, and that their judgment was a lien thereon. The plaintiff replied, alleging that said judgment was fully paid and satisfied prior to the issuance of the execution, and that said payment and satisfaction was made by the payment of \$290.20 on the fourth day of September,

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1878, and by three promissory notes executed by said McIntyre, with J. B. McIntyre as surety, each of said notes being for the sum of \$287.33, and that said notes were given and received in full satisfaction of said judgment, and had been since paid, in part, the unpaid notes being still held by the defendants. On the trial of the cause the plaintiff sought to prove this allegation of the reply, to which objection was made and the testimony rejected. Without stopping to inquire whether this question is or is not properly before the court, we will say that, if the fact exists, it is clear that it is one of the elements of the plaintiff's cause of action, and should have been alleged in the petition. "A plaintiff can recover only on the cause of action stated in his petition. It is not the province of a reply to introduce new causes of action. This can be done only by amendment to the petition." Maxw. Pl. & Pr., 108; Durbin v. Fisk, 16 Ohio St., 534. If the judgment has been paid, it should have been so alleged in the petition, so that the proper issue could have been formed upon that question, and tried as other issues tendered by the plaintiff in an action are tried. This not being done, there was no error in the ruling of the court. * * *

Judgment affirmed.

_____ for def.

WEST v. CAMERON.

39 Kan., 736. [1888.]

VALENTINE, J.: This was an action in the nature of ejectment, and also to set aside a tax deed. It was brought in the district court of Ellis county, on March 4, 1884, by R. W. Cameron against F. D. West and J. C. West, for the recovery of section 23 (640 acres), in township 13, range 19, in said county, and also to set aside a tax deed upon the land, executed to F. D. West by the county clerk of said county, on November 28, 1881, for the taxes of 1877. * * * The case was tried by the court without a jury, and judgment was rendered in favor of the plaintiff for the recovery of the land, and in favor of the defendant, F. D. West, for the recovery of the taxes; and both sides now complain—the defendant F. D. West, filing a petition in error, and the plaintiff, Cameron, filing a cross-petition in error. The plaintiff in error, defendant below, now claims that

Only exception to rule against
departure is same as at com. law:
Under Code to plea of "infancy,"
plain. may reply "non est."

the plaintiff below could not and cannot maintain his present action, and that the court below erred for the following reasons, to-wit: * * * (3) The defendant's answer to the plaintiff's petition set up new matter, to which the plaintiff has never replied. * * *

3. The new matter set up in the defendant's answer did not constitute a defence to the plaintiff's petition, and therefore did not require a reply. It was simply that the defendant had made valuable and lasting improvements on the land, and that the plaintiff had not tendered the taxes. These are matters to be adjusted after the decision upon the main question in the case. * * *

Judgment reversed (on other grounds).

for plain on this point

DIX v. GERMAN INS. CO.

65 Mo. App., 34. [1896.]

ROMBAUER, P. J.: * * * The case is in many respects peculiar. The plaintiff sues for a fire loss of \$400. His petition states that the policy was taken out by his late wife on a dwelling house, and contained a provision that, in case of her death, the policy should continue in force, and the loss, if any, be payable to *the one entitled under the law to said dwelling house*; that his wife died before loss, whereupon he as tenant by the curtesy became entitled to the property insured, and hence to the benefit of the contract of insurance. The answer of the defendant company does not set out the terms of the policy, but among other defences sets up a defect of parties plaintiff in this, that the plaintiff *was not the sole heir of the assured*, but that the appellants herein claim the property as heirs in law of the assured. The answer prays that they be made parties to the suit. The court thereupon made an order making them parties to the suit, and they filed their answer. This answer also fails to set out the terms of the policy, but avers that it was issued to their mother, and that the defendant company, admitting its liability to some one for the loss, has paid \$350 into court. The answer then concludes: "Defendants further state that said insurance policy is a contract with said Mary W. Dix alone, con-

tracting to pay her personally \$400, if said building in said policy should be destroyed by fire within the year specified therein; that, said loss having occurred after the death of said Mary W. Dix, intestate, and these defendants being her only surviving children and heirs, there being no administration on her estate, and there being no administrator of the estate of said Mary W. Dix, these defendants alone are entitled to the proceeds of said insurance policy, and the plaintiff has no interest in the same, and is not entitled to any part of the same." The answer concludes with a prayer that the court may award to them the proceeds paid into court.

The court awarded the fund to the plaintiff. Its decree is likewise silent as to the terms of the policy. It recites that Mary W. Dix insured the dwelling house in her lifetime in the sum of \$400; that it was destroyed after her death; that the plaintiff was the husband of the assured and had a curtesy interest in the land, and that the *interpleaders* are the sole surviving children of the assured; that the defendant company paid the amount of the loss into court; that the plaintiff subsequently rebuilt the house at a cost exceeding \$400.

The appellants claim that this decree is erroneous upon the facts conceded by the record. This claim is not tenable. Conceding that the allegations of the plaintiff's petition are true, namely, that the *loss was payable to the one entitled under the law to the dwelling house*, he was clearly the person entitled to recover, because he was entitled to said dwelling house as tenant by the curtesy. There is nothing to show that the allegations of the plaintiff's petition are untrue, as the evidence offered, including the policy sued upon, is not before us.

Nor can the appellants derive any advantage from the fact that their answer was not replied to. The answer set out no new matter which required a reply. The fact that the appellants are the surviving children of the assured and her heirs, and that no administration has been taken out on the estate of the assured, even if true, does not lead to the conclusion that they are entitled to recover upon the policy. The last part of the answer is not the statement of a fact but a conclusion of law, and hence is not admitted by a failure to reply. Even if the contract of their mother were a personal one on which her representative could proceed for a loss happening after her death, yet the position of the appellants would not be bettered, since they are

not, under the allegations of the answer, *the personal representatives of the deceased.* * * *

Judgment affirmed.

for plain-

ENNIS v. CASE MANUF'G CO.

30 Fed. 487. [1887.]

THAYER, J. This is an action at law for breach of a contract for services. The contract is alleged to have been made October 1, 1884, and covers services to be rendered from January 1, 1885, to December 31, 1885. A plea is interposed to the effect that the contract was verbal, and was not to be performed within one year, and hence is within the statute of frauds. By way of reply to the plea, plaintiff avers that on the fifteenth of January, 1885, the contract of October 1, 1884, was modified by agreement by striking out one of its provisions, and that as thus modified plaintiff duly performed the same. To the reply there is a demurrer. Obviously, that part of the reply which alleges a modification of the contract on January 15, 1885, is not a sufficient answer to the plea of the statute of frauds. If the pleader intended to state that, in point of fact, the contract described in his petition as made on October 1, 1884, was not made until January 15, 1885, and for that reason the plea of the statute is not tenable, then the reply is in the nature of a departure from the original cause of action, and on that ground the demurrer should be sustained. If, on the other hand, the pleader intends to adhere to the original averment that the contract on which he sues was made October 1, 1884, the plea of the statute remains unanswered, unless we construe the last clause of the reply (which is a general denial) as intended to be a response to the plea of the statute. We think it evident, from the form of the pleading, that the pleader intended to allege the modification of the contract on January 15, 1885, as a defence to the plea of the statute. In other words, we think he intended to say that the contract on which he sues was made on January 15, 1885, instead of October 1, 1884, as at first alleged. Our judgment is, therefore, that the reply is bad, as being a departure from the original cause of action. We accordingly sustain the demurrer. Plaintiff can only avail himself of the facts

This is a clear case of departure. But the court is wrong when it says the departure is in dates; the departure is in alleging one contract instead of another.

Def. can plead the Statute of Frauds specially if he wants to.

Plain. he is shifting his ground of recovery by replying that the contract has been modified, he shaves the time off by saying on a different contract than the one proposed in the complaint.

stated in the reply (if they constitute a defence to the plea) by an amendment of his petition. The petition cannot be amended by virtue of allegations contradictory thereof contained in the reply.

for def.

MOLLYNEAUX v. WITTENBERG.

39 Neb. 547. [1894.]

HARRISON, J. * * Having concluded that the agreement was valid, then it follows that the petition declaring upon it stated a cause of action, there being alleged—First, a valid contract; second, a breach of it; and, third, the damages arising from such breach. The answer admits almost everything pleaded in the petition, possibly denying that plaintiff suffered any damage, alleges matter in avoidance, and sets up affirmatively the “waiver.” The reply meets the portion of the answer founded upon the waiver by affirmatively stating that the defendants have failed to comply with the provisions of the waiver; and it is of this allegation in the reply that complaint is made by defendants, they contending that it was an attempt, by plaintiff, to introduce a new cause of action by his reply, different from that stated in the petition. If the recovery, if any, by plaintiff on a trial of the case, would be founded upon the waiver, and for a breach of its conditions alone, this position is a true one. On the other hand, if the matter alleged in the reply, relating to the waiver set up in the answer, and constituting a defence to it, was not inconsistent with the petition, then it is not a true position. After a careful examination of the pleadings, we are satisfied that the action of the plaintiff was necessarily founded upon the original agreement of defendants not to use the property for hotel purposes, and its breach, the waiver being merely collateral to the original contract and incident to it, and purely a matter of defence; that the cause of action set up in the petition was complete without alleging the waiver, and negating its force or effect; that, when the waiver was alleged in defendants’ answer as matter of defence, it was proper and good pleading to deny it, or affirmatively show by the reply that defendants had, by their failure to comply with some of its requirements, or rather by their violation of such requirements or

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conditions, rendered it of no value or force, and destroyed any effect it might otherwise have had in releasing the defendant from the original agreement; and, if evidence had been introduced which established the plaintiff's contention as pleaded in the reply, the waiver would have been fully avoided, and the plaintiff entitled to damages, not under the waiver, but from the breach of the original contract or agreement, to which the waiver, by its terms, refers the parties. "A plaintiff, in replying to new matter set up in an answer, may allege any new matter, not inconsistent with the petition, constituting a defence to such allegations contained in the answer." *Cobbe v. Knapp*, 23 Neb. 579, (37 N. W. 485).

Reversed (on other grounds).

CRAIG v. COOK.

28 Minn. 232. [1881.]

DICKINSON, J. The only pleadings in this case were the complaint and answer. Upon the trial, the defendants moved for judgment on the ground that the answer contained new matter, which, for want of a reply, stood admitted. The court denied the motion, and defendant excepted. The complaint alleges that on the thirty-first day of March, 1879, the plaintiff was lawfully and peacefully in possession of a certain hotel building, (described), and that on that day the defendant broke and entered said house, and forcibly ejected her, therefrom, without authority of law, and struck, beat, and abused her, and threw her goods from said building into the streets.

The answer contains, *first*, a general denial of the whole complaint, and then further alleges that the defendant was, on the occasion referred to, and long had been, the owner in fee and in actual possession of the real estate and premises described in the complaint; that the plaintiff was, by permission of the defendant, stopping in the house as a mere lodger only; that at the time referred to in the complaint the plaintiff forcibly and unlawfully undertook to evict the defendant from his premises, and to take possession thereof, and in so doing, the plaintiff committed an assault and battery upon the defendant, who, in de-

fending himself therefrom, used no more force than was necessary for that purpose.

A defendant is not entitled to judgment by reason of the fact that new matter pleaded in the answer has not been replied to, unless such new matter constitutes a competent defence. "New matter constituting a defence" is not pleaded by averments which merely deny the allegations of the complaint, but only when they constitute a statement of facts, the proof of which avoids the legal conclusion otherwise to be drawn from the statement of facts in the complaint. It is in the nature of a plea of confession and avoidance. Pom. Rem. & Rem. Rights, §§ 690-692.

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The answer in this case does not contain new matter constituting a defence to the action. The answer, without a reply, puts in issue the asserted right and possession of the plaintiff, and the trespass of the defendant, and upon such issue the plaintiff was entitled to go to the jury. The plea of title in the defendant is not inconsistent with a lawful and exclusive possession in the plaintiff, and if admitted, would not entitle the defendant to a judgment. Therefore, the court was right in refusing the motion for judgment upon the pleadings. The court did not err in refusing, upon the trial, to require the plaintiff to elect as between several causes of action which defendant then claimed to have been improperly joined. Assuming that the complaint alleges facts showing a right of recovery, both for trespass upon real property and for assault upon the person, it is clear that the case is within the statute authorizing the joining of causes of action for "injuries with or without force to person and property, or either." Gen. St. 1878, c. 66, Sec. 118.

If any remedy was desired for not stating separately what are claimed by defendant as distinct causes of action, it should have been, not by motion upon the trial to compel an election, but by motion at the proper time to make the complaint definite and certain, so that defendant might know whether the plaintiff intended to rely on one or all of the mingled causes of action, (Colton v. Jones, 7 Rob. 164;) or, perhaps, by motion for an order requiring the several causes of action to be separately pleaded. * * *

Judgment affirmed.

STATE EX. REL. RY. CO. V. DISTRICT COURT.

79 Pac. (Mont.) 547. [1905.]

Mandamus to compel the District Court to reinstate a cause which plaintiff had dismissed pending motion for judgment on the pleadings.

HOLLOWAY, J., after stating the facts delivered the opinion of the court:

It is to be noted in the first instance that the defendant had pleaded in its answer contributory negligence on the part of the plaintiff and negligence of the fellow servants of the plaintiff as a special defence. Whether the defence of negligence of a fellow servant is a special defence which must be pleaded is unnecessary to be determined here. The authorities are conflicting upon the question. But contributory negligence on the part of the plaintiff in an action of the character of this one is such a special defence, and must be pleaded by the defendant. This doctrine has the support of an unbroken line of authorities in this state from *Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450, to the recent case of *Nord v. Boston & Montana C. C. & S. M. Co.*, 30 Mont. 48, (75 Pac. 681). See, also, 2 Current Law, 1007; 5 Ene. Pleading & Practice, 1, and cases cited. The pleading of this defence constituted new matter within the meaning of section 720 of the Code of Civil Procedure, as amended by an act of the Legislature approved February 22, 1899 (Sess. Laws 1899, p. 142) and any mere anticipatory denials in the complaint of the facts constituting this special defence were insufficient (*L. & N. R. Co. v. Paynter's Admin.* (Ky.) 82 S. W. 412), and the failure to reply to such allegations of new matter was an admission on the part of the plaintiff of the truth of the facts therein set forth, if those facts were sufficiently pleaded. * * *

Writ issued.

SNODGRASS v. HUNT.*15 Ind. 274. [1860.]*

DAVISON, J. Hunt sued the appellants, who were the defendants, for an assault and battery. The complaint contains two counts. 1. That on the — day of November, 1856, the defendants assaulted, beat, and wounded the plaintiff, whereby he

is damaged, &c. 2. That theretofore, on November 21, 1856, the defendants unlawfully, and with force, &c., committed an assault on the plaintiff, and him, the plaintiff, did beat, bruise, and wound, to his damage, &c. The defendants answered: 1. By a general traverse. 2. *Son assault demesne*. And, 3. John Snodgrass, for separate answer, sets up, by way of counter-claim, that on said 21st of November, the plaintiff, with force, &c., made an assault on this defendant, and with clubs, &c., did then and there beat, bruise, and wound the defendant, to his damage, \$6,000, for which he demands judgment against the plaintiff. And the defendant avers that the assaulting, &c., of him by the plaintiff, was connected with, and was the cause of, the beating &c., complained of by the plaintiff.

To the second and third defenses, the plaintiff replied by a general denial; and to the second, he also replied, specially, that the beating, &c., in that paragraph alleged, was excessive and cruel, and greatly exceeded what was necessary for the purposes of self-defense, &c.

There was a demurrer to the second reply, on the ground "that several grounds of defense are improperly united, in this; that a general traverse, or *de injuria*, and excess, are each severally replied to the second paragraph of the answer, which replies are inconsistent with each other, and with the complaint, and cannot properly be united." The Court overruled the demurrer, and the defendant excepted. There is nothing in this exception. Under the Practice act the plaintiff may, in addition to the general traverse, set up new matter in avoidance of the answer, and may tender as many issues as he pleases, so that they are not inconsistent with the complaint, or frivolous. *Zehnor v. Baird*, 8 Ind. 96; 2 R. S., § 67, p. 42. But the defense of excess is, evidently, consistent with the complaint; because, though the plaintiff may have been guilty of what, in point of law, amounted to the first assault, still, if the beating, &c., alleged to have been in self-defense, was, in the language of the reply, "excessive and cruel, and greatly exceeded what was necessary for that purpose," the defendants, themselves, became trespassers; and, being so, were properly charged in the complaint.

* * *

Judgment affirmed.

MOORE v. GRANBY & SMELTING CO.

80 Mo. 86. [1883.]

EWING, C. This suit was commenced January 13th, 1880, by filing a petition in substance: That in 1870 the plaintiff was in possession of forty acres of land in Cherokee county, Kansas; that defendant, by one J. Morris Young, who was defendant's agent and superintendent at Orenogo, Missouri, applied to plaintiff to purchase his interest in the land, and thereupon plaintiff sold his interest to said Young for \$350, of which amount \$175 was paid, and the other \$175 was to be paid whenever said Young or his assigns should obtain the full title to the land; that the title was in dispute, and consequently it was agreed between said Young and the plaintiff that the trade was to be kept secret, and he was to assist said Young in perfecting the title; that the title was finally settled to be in one Joy, and on the 29th day of August, 1870, said Young contracted with said Joy for the legal title, paying \$20 cash, and agreeing to pay the balance in six annual payments; first, January 1st, 1873; and was to receive a deed therefor upon final payment which would be in January, 1879; that said Young all along acted as agent for defendant, who furnished all the money, and that he immediately transferred said contract to defendant, and plaintiff delivered possession of the land to defendant, and defendant has received a deed, and that the balance of the said purchase money "owing to plaintiff is due and unpaid." Therefore, he prays judgment for \$175 and interest from August, 1879.

The answer was a general denial and a plea of the statute of limitations, that the suit was not commenced within five years after the cause of action accrued. * * *

II. The statute of limitations is insisted on as a bar to plaintiff's recovery. The replication to the plea of the statute simply denied "each and every allegation of new matter therein." The plaintiff, to avoid the bar of the statute, offered to, and did read the written contract to show the terms of plaintiff's obligation; and other evidence tending to show that plaintiff failed to bring his suit because he was acting under the directions of defendant's agent Young, and awaiting his instructions, and depending upon his assurances that it would be made satisfactory, etc., until in 1870 when he first ascertained the defendant had procured the

title to the land. The defendant insists that this evidence was not admissible under the replication.

Whenever the plaintiff relies on some special matter in his replication to the plea of the statute, he must plead it. Angell on Lim., §§ 292, 184; Vassault v. Seitz, 31 Cal. 225; Bliss Code Plead., § 393; Clark v. Hougham, 3 Dowl. & Ry. 330; Hubbell v. Fowler, 1 Abb. Pr. (N. S.) 1; 2 Chitty Plead., 435. In this case the replication was not sufficient to authorize the hearing of evidence to the effect, that by the fraud or misconduct of defendant, the running of the statute was suspended. The defendant must have information as to the facts proposed to be set up as a suspension of the statute, and the court erred in admitting this evidence. * * *

Judgment reversed.

STERN v. FREEMAN.

4 Metc. (Ky.) 309. [1863.]

Judge BULLITT delivered the opinion of the court:

Freeman brought this action, and attached property belonging to Stern, a non-resident, to satisfy a note executed by him to the plaintiff. Stern answered, that, "at the time of the execution of said note, this defendant was an infant under the age of 21 years;" and this is the only defence that we need to notice.

Defendant's answer and the evidence show that the plaintiff and defendant were merchant partners until October 22, 1859, when the plaintiff sold his interest in the concern to the defendant, then under 21 years of age, in consideration of the note sued on, and other notes then executed. Defendant attained the age of 21 years in December, 1859. It is proved by parol evidence, that, up to the time this action was brought, in June, 1860, defendant, in his own behalf, carried on the business, selling the goods and collecting the debts, that formerly belonged to him and the plaintiff; and it is proved, that, in March, 1860, about three months after he attained the age of 21 years, he wrote a letter to Liebor, who owed money for goods purchased from Freeman and Stern, stating that he "had been collecting the debts due the firm of Freeman & Stern, and that he was

going on in the same business in his own name." The chancellor rendered judgment for the plaintiff, to reverse which the defendant appeals. * * *

The note, having been executed when the defendant was under 21 years of age, was voidable; and the simple statement of the fact in his answer is sufficient. He was not bound to aver that the note was voidable, nor otherwise to state the law of the case.

But the plaintiff contends that the note was made unavoidable by the ratification of the defendant. And here the question arises, whether or not the plaintiff was bound to aver the ratification in his petition, or by an amended petition.

The Code of Practice declares, that, "there shall be no reply except upon the allegation of a counter-claim or set-off in the answer;" (Sec. 132), and that, "the allegation of new matter in the answer, not relating to a counter-claim or set-off, * * * is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require." (Sec. 153) The question is, whether or not, under the old practice, the plaintiff could reply a ratification of the contract, in avoidance of the plea of infancy. If he could, he may, under the Code, prove the ratification without a reply, and without setting it forth in an amended petition.

Upon this question there seems to have been some conflict of opinion, as is shown by the cases referred to in *Moor v. Williams*, 11 Mees. & Welsby. Mr. Chitty, however, without referring to any conflict of opinion upon the subject, says, that to a plea of infancy in *assumpsit*, the plaintiff "may reply to the whole, or part, that the defendant ratified and confirmed the promise after he came of age." (1 Chitty Pl., 612.) And again, in speaking of replications which confess and avoid the plea, he says, that, "if infancy be pleaded, the plaintiff may reply that the goods were necessities, or that the defendant, after he came of age, ratified and confirmed the promise." (Id., 657.) The doctrine stated by Mr. Chitty seems to be founded upon principle. The manner of pleading depends upon the question whether the right of recovery, in such cases, is based upon the original contract, or upon the ratification. If upon the latter, it would have been necessary, under the old practice, in all actions, excepting, perhaps, *general assumpsit*, to declare upon the ratification, or to set it forth by a new assignment, in the form of a replication to the plea of infancy, which would have been,

in effect, declaring anew upon the ratification. But if the right of recovery is based upon the original contract, the ratification, under the old practice, would have formed matter for a replication in confession and avoidance of the plea.

That the right of recovery, in many if not all such cases, is based upon the original contract, and not upon the ratification, seems to be conclusively proved by the fact, that, by the common law, the plaintiff may recover upon a contract made by the defendant during infancy, which he has ratified by merely failing to disaffirm it within a reasonable time after coming of age, (*Kline v. Beebe*, 6 Conn., 494; 2 Kent's Com., 238), since it is clear that a person cannot be held liable for failing to disaffirm a contract which he is not bound to disaffirm; and, also, by the fact that, by the common law, a sale of land by an infant may be ratified verbally, notwithstanding a statute prohibiting the sale of land except by writing. (*Houser v. Reynolds*, 1 Hayea, 143; *Wheaton v. East*, 5 Yerger's Tenn. R., 41). It seems clear, that in both those classes of cases the right of recovery is based, and can be based only, upon the original contract, the ratification having no effect whatever, except to prevent the defendant from avoiding his contract.

Probably where a person, after coming of age, has promised to pay a debt contracted during infancy, or has done an act from which the law implies such a promise, the plaintiff might declare upon the new promise, relying upon the original consideration to support it. But he is not obliged to do so. He may declare upon the original contract, and show the new promise, like any other ratification, in avoidance of the plea of infancy. This results necessarily from the fact that the contract is voidable only, and not void. It is valid until disaffirmed. No ratification is needed to make it binding. Disaffirmance is needed to invalidate it. The plaintiff may, therefore, sue upon it, and if the defendant pleads infancy, the plaintiff may avoid the plea by showing a promise, or other act of ratification, by which the defendant has deprived himself of the right to avoid the contract. In such a case, the only effect of the ratification is to prevent the defendant from disaffirming the contract sued upon, which, being valid until disaffirmed, clearly forms the basis of recovery, the ratification forming matter of confession and avoidance to the plea of infancy.

It may be proper to add, that, under the Code of Practice,

this question probably stands upon a different footing from that relating to an acknowledgment or promise, relied upon to save a claim barred by limitation.

It follows, from what we have said, that the plaintiff in this case had a right to prove a ratification of the contract, without averring it in his pleadings. * * *

Judgment affirmed.



CHAPTER VI.

DEMURRERS.

CODE PROVISIONS:

Defendant must demur or answer.—The only pleading, on the part of the defendant, is either a demurrer or an answer.—*N. Y. Code Civ. Proc., sec. 487.*

When he may demur.—The defendant may demur to the complaint, where one or more of the following objections thereto appear upon the face thereof:

1. That the court has not jurisdiction of the person of the defendant.

2. That the court has not jurisdiction of the subject of the action.

3. That the plaintiff has not legal capacity to sue.

4. That there is another action pending between the same parties, for the same cause.

5. That there is a misjoinder of parties plaintiff.

6. That there is a defect of parties, plaintiff or defendant.

7. That causes of action have been improperly united.

8. That the complaint does not state facts sufficient to constitute a cause of action.—*Ib. Sec. 488.*

Demurrer to complaint must specify grounds of objection.—The demurrer must distinctly specify the objections to the complaint; otherwise it may be disregarded. An objection, taken under subdivision first, second, fourth, or eighth, of section four hundred and eighty-eight of this act, may be stated in the language of the subdivision; an objection, taken under either of the other subdivisions, must point out specifically the particular defect relied upon.—*Ib. § 490.*

The defendant may answer or demur.—The only pleading on the part of the defendant is either a demurrer or an answer.—*Mo. R. S. 1899, sec. 596.*

Defendant may demur for what causes.—The defendant may demur to the petition, when it shall appear upon the face thereof, either: First, that the court has no jurisdiction of the person

of the defendant, or the subject of the action; or, second, that the plaintiff has not legal capacity to sue; or, third, that there is another action pending between the same parties, for the same cause, in this state; or, fourth, that there is a defect of parties plaintiff or defendant; or, fifth, that several causes of action have been improperly united; or, sixth, that the petition does not state facts sufficient to constitute a cause of action; or, seventh, that a party plaintiff or defendant is not a necessary party to a complete determination of the action.—*Ib. Sec. 598.*

Demurrer must be specific.—The demurrer shall distinctly specify the grounds of objection to the pleadings. Unless it does so, it may be disregarded.—*Ib.*, § 599.

Section 1. General Nature of Demurrers.

DODGE v. COLBY.

108 N. Y. 115. [1888.]

RUGER, C. J. The defendant demurred to the complaint in this action, and to each separate cause of action stated therein, upon three grounds, viz: *First*, that the court has not jurisdiction of the subject of the action; *second*, that the complaint does not state facts sufficient to constitute a cause of action; *third*, that causes of action have been improperly united, viz., a cause of action for slander of title, which is a transitory action, with one for trespass on lands without the state, of which the court has no jurisdiction. The special term overruled the demurrer, and on appeal to the general term that court reversed the order of the special term. The general term held that the first and second counts of the complaint each stated a cause of action arising out of trespasses upon lands situated in the state of Georgia, and that in respect to such actions the courts of this state had no jurisdiction, and therefore sustained the demurrer to those counts. * * *

We are, however, unable to agree with the general term in the conclusion reached by it that the third count does not state a good cause of action. We are inclined to think that this result was arrived at through inadvertence in failing to observe the allegation in the count, that the statements alleged to be slander-

ous "were false and defamatory, and were made and caused to be circulated and published by the defendant and his agents, maliciously and with the intent to injure the said plaintiff and his title to the said lands." The demurrer concedes the truth of this allegation, and renders it improper for the court to refer to the statements so alleged to be false, defamatory and malicious, as the foundation of a claim that they were made in good faith and in the exercise of a lawful right on the part of the defendant to assert his title to the lands referred to. The statement in the count alleged to have been made by the defendant that his title had been investigated by four able legal gentlemen who unanimously concurred in pronouncing the plaintiff's title bad, was precisely one of the statements which the complaint alleged to have been false, defamatory, and malicious, and the truth of which characterization was admitted by the demurrer. It was error, therefore, in the court below to refer to this statement as proof of the propriety of the defendant's claim to be the owner of the lands, or as justifying, in any degree the alleged slanderous statements. We are of the opinion that this count of the complaint substantially complied with the requirements of the rule relating to the statement of a cause of action for slander upon title.

Our conclusion, therefore, is that judgment of the general term should be affirmed, except in so far as it relates to the third count, and as to that it should be reversed, and that of the special term affirmed, without costs to either party upon this appeal.

Judgment reversed.

JONES v. FOSTER.

67 Wis. 296. [1886.]

CASSODAY, J. The testimony given upon the trial is not all preserved in the record. In fact, it is conceded that only a very small portion of it is preserved; and that only so far as it covered certain points involved in the motion to set aside the verdict and for a new trial. The questions here presented arise upon the pleadings and the facts are found by the special verdict.

1. It is said there is a defect of parties plaintiff, in the omission of Cummings Merrill, who was a partner of the plaintiffs in

making the contract upon which the action is brought, and continued to be such for nearly a year after, when he withdrew from the firm, and assigned and transferred all his interest therein, including the contract, to the plaintiffs, to the knowledge of the defendants. The alleged defect appeared upon the face of the complaint, and hence might have been raised by demurrer, as provided in Section 2649, Rev. Stat. * * *

Here the defendants, in July, 1881, without raising any such objection, answered upon the merits. It is admitted that a trial upon the issue so formed was had in the fall of 1881, which resulted in a verdict and judgment in favor of the plaintiffs, which were set aside, and a new trial granted, November 21, 1881. By such answer and trial the defendants waived all objection to the complaint on the ground of defective parties plaintiff, under the authorities cited. Some two months afterwards, the defendants put in a new answer, embodying a demurrer for defects of parties plaintiff, as above indicated. To make this available upon the last trial, the defendants objected to any evidence being given under the complaint. The statutes do not contemplate a demurrer of this nature as being embodied in an answer upon the merits. "The defendant may demur to one or more of the *several* causes of action stated in the complaint, and answer the *residue*." Section 2650, Rev. St. This clearly implies that he is not to do both to the same cause of action. The two things are inconsistent. A demurrer admits the existence of every fact that is well pleaded. An answer upon the merits takes issue with the same facts. Even an objection, by way of answer, on the ground of a defect of parties plaintiff, is by way of abatement, and not in bar. Such a plea in abatement is waived by pleading the same matter in bar. * * *

*Judgment affirmed.**

GRIGGS v. CITY OF ST. PAUL.

9 Minn. 246. [1864.]

WILSON, J. To the complaint in this case the defendant interposed a general demurrer. It becomes necessary for us therefore to inquire whether the facts alleged in the complaint show

*See, also, Fisher v. Scholte, 30 Ia. 221.

that the plaintiffs have a cause of action. The gist of the action is the invalidity and worthlessness of certain "certificates" delivered to the plaintiffs in payment for work and labor by them performed. The allegations of the complaint on this point are, "that by reason of gross negligence of said commissioners, and of all the defendant's agents in that behalf, in causing to be made an estimate of the whole expense of such work, and of the proportion to be assessed and charged to each lot, and of the number of cubic yards to be filled in and excavated in front of each lot, and in not causing such estimate to be filed with the then city comptroller of said city, for the inspection of the parties interested, each and all of the said certificates at the time of said tender and delivery were utterly worthless, and no lien upon, nor collectible out of, the lots therein described in any manner," etc.

There is hardly a single *traversable fact* alleged. The statement that said certificates are worthless and no lien upon nor collectible out of said lots is a conclusion of law, and therefore not admitted by the demurrer. "The gross negligence of the defendant's agents" does not necessarily render the defendant liable to an action. The acts of either omission or commission injurious to the plaintiffs (if they were such) by which such negligence was manifested, should have been specifically averred in the complaint. They were part of the facts constituting the plaintiff's cause of action, and therefore it was incumbent on them to *allege* and *prove* them.

The *inference*, we think, to be drawn from the language of the complaint above quoted is that the "estimate" was made, but in a negligent manner, and that it was filed, but not with the "then" city comptroller. The point of time intended to be fixed by the pleader by the use of the language "the then city comptroller," is not apparent, and as the object of this suit is to show the "*certificates*" to be void, not merely *less* valuable on account of negligence of defendant's agents, the time of filing the "estimate" may be a *material fact*, and it therefore should have been alleged. See *Nash v. City of St. Paul*, 8 Minn. (179); *id.* (184-5).

But we do not wish to here intimate any opinion on the question of the validity of these "certificates." Such question is not properly before us. It is not required of either the defendant or the court to spell out from inferential statements or recitals the

meaning of the complaint. *Every fact* which the plaintiff must prove to enable him to maintain his action, and which the defendant has a right to controvert in his answer, must be *distinctly averred*, and a conclusion of law not justified by the facts stated is irrelevant and nugatory. Hall v. Bartlett, 9 Barb. 301; Allen v. Patterson, 7 N. Y. 478; Boyce v. Brown, 7 Barb. 85; Garvey v. Fowler, 4 Sandf. 665; Smith v. Leland, 2 Duer. 508-9; Jones v. Phoenix Bank, 8 N. Y. 238; Lienan v. Lincoln, 2 Duer. 672; Laurence v. Wright, id. 674-5; Mann v. Morewood, 5 Sandf. 564; City of Buffalo v. Holloway, 7 N. Y. 498; Schenk v. Naylor, 2 Duer. 675.

The law on this subject is very clearly laid down by Mr. Justice Duer, in case of Mann v. Morewood, in the following language: "The language of this court, and I believe of all its judges, from the time the Code has been in operation, has been uniform, that a complaint must set forth all the material and issuable facts which are relied on as establishing the plaintiff's right of action, and not the inferences from those facts which under the advice of his counsel he may deem to be the conclusion of law. To draw proper conclusions from the facts which are relied on as constituting a cause of action, or a valid defense, is the exclusive province and duty of the court, and to enable the court to discharge that duty, the facts themselves, not the conclusions that are supposed to flow from them, must be stated in the pleading."

The demurrer only admits the *traversable facts*, not inferences or conclusions of law. Moss v. Riddle, 5 Cranch, 351; Hall v. Bartlett, 9 Barb. 301; Ford v. Peering, 1 Ves. Jr. (Summer's ed.) 77, and cases cited in note; City of Buffalo v. Holloway, 7 N. Y. 493. The demurrer we think was well taken, and the order of the court below overruling it is reversed.

Judgment reversed.

AMERICAN TRADING & STORAGE CO. v. GOTTSTEIN.

123 Iowa 267. [1904.]

Appeal by plaintiff from judgment on demurrer to its complaint.

McCLAIN, J. The objection raised by the demurrer to the plaintiff's recovery on the Illinois judgment set out in the peti-

tion is that the Illinois court has no jurisdiction of the defendant, and, therefore, the judgment rendered is void. The claim of want of jurisdiction is predicated upon two grounds: First, that in its bill of complaint in the Illinois court the complainant (plaintiff in this action) did not ask relief by way of a personal judgment against the defendant; and, second, that after rendering a final decree in the action which did not include any personal judgment against the defendant, the Illinois court proceeded without jurisdiction to render a subsequent decree, which is the one relied on by plaintiff, in which it is adjudged that the complainant recover of the defendant the sum of \$532.93, for which execution shall issue as upon a judgment at common law. It is sufficiently shown by the allegations of the complaint that the defendant appeared in the Illinois court so as to confer upon that court jurisdiction to render a personal judgment, provided the court had the power in such proceeding and at the time the final decree was rendered to enter a personal judgment. In the complaint filed in the Illinois court relief is asked by way of foreclosure of a lien against certain personal property alleged to belong to the defendant for certain storage and handling charges in connection with such property shipped by defendant to complainant at Chicago for sale, with an additional prayer for "such other and further relief in the premises as equity may require and as to the court may seem meet." The objection that this complaint did not give the Illinois court jurisdiction to enter a personal judgment is not well taken, for several reasons. In the first place, the decree of the Illinois court having jurisdiction of the parties is conclusive as against collateral attack on the question of law as to whether the complaint was such as to warrant a personal judgment. There are, no doubt, expressions in text-books and opinions to the effect that a judgment for relief, not asked for in the complaint, is void for want of jurisdiction, but, as far as any authorities to this effect are cited for appellee, they relate to cases where the question was raised by way of appeal or other method of direct attack, or where the judgment was by default, and therefore without jurisdiction, except in so far as the defendant was advised by the notice of summons and the complaint or other pleading filed that judgment might be rendered against him. It is not necessary now to discuss the authorities on this subject, as our conclusion is sufficiently supported by other considerations hereinafter stated.

It seems to be well settled under the authorities that a prayer for general relief in a complaint in equity will sustain a personal judgment. *Iler v. Griswold*, 83 Iowa, 442, 49 N. W. 1023; *Thomas v. Farley Mfg. Co.*, 76 Iowa, 735, 39 N. W. 874. Thus, in *Cushman v. Bonfield*, 139 Ill. 219, 28 N. E. 937, it is held that a bill for the specific enforcement of a contract, which also contains a prayer for general relief, will support a money decree, although the specific relief asked cannot be given. And to the same effect are *Gibbs v. Davies*, 168 Ill. 205, 48 N. E. 120, and *Penn v. Folger*, 182 Ill. 76, 55 N. E. 192. We think there can be no doubt of the power of the Illinois court, as a general principle of equity practice, to enter, as it did, personal judgment for the balance of the indebtedness of defendant to the complainant after the application in discharge of complainant's lien of the amount realized by judicial sale of the property subject to the lien. But, if there could be any doubt of the sufficiency of the complaint to sustain the decree for a money judgment under the general rules of procedure recognized in this state, it is removed, so far as this case is concerned, by plaintiff's allegation in an amendment to his petition that by the general usage and practice of courts of equity in the state of Illinois and the decisions of the Supreme Court of said state a court of chancery of that state has jurisdiction under such prayer for general relief to enter a personal judgment when the same is consistent with the allegations of fact contained in the bill, and that the decree of the Illinois court was rendered in accordance with such usage and practice. This allegation of fact as to the law of Illinois is confessed by the demurrer, and we are bound, therefore, to assume, for the purpose of this case, as it is now before us, that the personal judgment was sufficiently warranted by the allegations of the bill of complaint. * * *

Judgment reversed.

FINNEY v. GUY.

189 U. S. 335. [1903.]

This action was commenced in the proper court of the state of Wisconsin to enforce the shareholders' liability under a Minnesota statute, in a corporation of Minnesota and doing business in that state. The defendant demurred to the complaint on the

ground, among others, that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled by the trial court and judgment given for the plaintiff, which was reversed by the supreme court of the state, and the case has been brought here by plaintiff to review the judgment of reversal.

* * * *

Mr. Justice PECKHAM delivered the opinion of the court:

The demurrer raises the question whether the complaint states facts sufficient to constitute a cause of action. The plaintiffs contend that their cause of action is based upon the decisions and judgments of the courts of the state of Minnesota, and upon the statutes of that state, and that the Wisconsin supreme court, in sustaining the demurrer, has thereby failed to give that full faith and credit to the laws and judgments of the state of Minnesota and its courts which they receive in that state and which they are entitled to under the Constitution and laws of the United States, and that by reason thereof a Federal right has been denied them.

They urge that under the judgment of the American Sav. & L. Asso. v. Farmers' & M. State Bank, which was recovered in the Minnesota court, and is referred to in the foregoing statement of facts, the defendant is concluded as to her defense, to the same extent she would have been had she appeared and contested her liability in the Minnesota courts, and that, as a consequence, the Wisconsin courts are bound to give the same effect to that judgment in their courts that it has in the courts of Minnesota; that if such effect had been awarded that judgment, then this action could have been maintained; and the Wisconsin court, in sustaining the demurrer, denied such effect to the judgment, which was a violation of a right founded upon the Federal Constitution. * * *

* * * After quite a full examination of the Minnesota decisions on the question, we have just decided in *Hale v. Allison*, 188 U. S. 56, *ante*, 380, 23 Sup. Ct. Rep. 244, that a receiver appointed in Minnesota, under these same statutes, could not maintain an action outside of that state to enforce the liability of a stockholder; and it was said that the courts of Minnesota had held the same thing for many years. An examination of the decisions of the Minnesota courts shows that they had held that the remedy provided by the statutes of the state for the enforcement of stockholders' liability was a suit in equity in

that state by a creditor in his own behalf and that of all other creditors, against all the stockholders of the corporation, or so many of them as could be served with process, and that it was exclusive, and no other remedy could be availed of even within the jurisdiction of the courts of Minnesota. That being the law of Minnesota, it would, of course, prevent an action outside the state by a receiver, as well as by any other plaintiff, to enforce the stockholders' liability. Hence, in the Hale-Allison Case, we held the receiver could not maintain such an action in a foreign jurisdiction and in a Federal court. * * * This would call for an affirmance of the judgment but for the claim now urged by counsel for plaintiffs, that the case of *Allen v. Wash* has been overruled by a subsequent case in Minnesota, and that the law is correctly set forth in the complaint. He calls attention to the fact that this case has not gone to trial upon an issue of any question of fact, but the questions to be determined have arisen on demurrer to the complaint; that the complaint avers as a fact that by the law of Minnesota, such an action as this can be maintained in the courts of a foreign jurisdiction after a judgment has been recovered in an action in the state court, such as is referred to in the complaint, and that the defendant, by demurring admits that the law is as stated in the complaint, and therefore, the court is bound to give effect to the law of Minnesota such as is set forth in that pleading. This is too broad a claim to be maintained.

If the case had been on trial upon the issues of fact, among them being one as to what the law of Minnesota was, and the statutes as well as the decisions above mentioned had been proved, and a witness learned in the law of Minnesota had testified what such law was, as deduced by him from those statutes and decisions, his testimony would not, even though uncontradicted, conclude the court upon that issue. Although the law of a foreign jurisdiction may be proved as a fact, yet the evidence of a witness stating what the law of the foreign jurisdiction is, founded upon the terms of a statute, and the decisions of the courts thereon as to its meaning and effect, is really a matter of opinion, although proved as a fact, and courts are not concluded thereby from themselves consulting and construing the statutes and decisions which have been themselves proved, or from deducing a result from their own examination of them that may differ

from that of a witness upon the same matter. In other words, statutes and decisions having been proved or otherwise properly brought to the attention of the court, it may itself deduce from them an opinion as to what the law of the foreign jurisdiction is, without being conclusively bound by the testimony of a witness who gives his opinion as to the law, which he deduces from those very statutes and decisions.

It was stated by Mr. Justice BREWER, speaking for the court in *Eastern Bldg. & L. Asso. v. Williamson*, 189 U. S. 122, *ante*, 735, 2 Sup. Ct. Rep. 527, a case just decided and where the same question in substance was before us, as follows: "But it is contended that the construction of the New York statutes as applicable to this contract was shown by the decisions of the courts of that state and the opinion of one learned in its laws; that there was no contradictory testimony, and, therefore, it was the duty of the South Carolina courts to find as a fact that such was the true construction."

This was the contention of the defendant, and then after referring to the construction of the contract as contended for by the plaintiff, the justice continued:

"It is said that the promise made in the certificate is expressly based upon 'full compliance with the terms, conditions, and by-laws printed on the front and back of this certificate'; that one of the conditions expressed on the face of the certificate is: 'The shareholder agrees to pay, or cause to be paid, a monthly installment of \$.75 on each share named in this contract, the same to be paid on or before the last Saturday of each month until such share matures or is withdrawn'; that it contained this further stipulation: 'Payable in the manner and upon the conditions set forth in said terms, conditions, and by-laws hereto attached,' and that these matters thus referred to had the effect of changing the absolute promise to a conditional one. All these were received in evidence, and when so received, it became a matter of judicial construction to determine whether they had such effect, and that was a question which, nothing else being shown, was for the consideration of the courts in which the litigation was pending. In like manner, after the decisions of the courts of New York were received in evidence, their meaning and scope became matters for the same consideration. While statutes and decisions of other states are facts to be proved, yet

when proved, their construction and meaning are for the consideration and judgment of the courts in which they have been proved. Nor is the rule changed by the testimony given in the deposition of defendant's counsel; for, as he states, his opinion is based on the statutes, the articles of incorporation, and the decisions admitted in evidence, together with similar decisions of other states under like statutes, articles of incorporation, and by-laws. No witness can conclude a court by his opinion of the construction and meaning of statutes and decisions already in evidence. *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 336. The duty of the court to construe and decide remains the same." This right and duty of the courts to themselves construe the statutes and decisions are not altered because the law of the foreign state and the various decisions of its courts are alleged to be as set forth in a pleading which is demurred to, instead of being proved, on a trial. In this case the statutes together with references to the decisions of the state courts, are given in the complaint, and the pleader, by making an averment in the form of a fact, assumes to give a meaning to them such as he thinks to be correct; but the duty still remains with the courts to themselves determine from those statutes, and decisions what is in truth the law of the foreign jurisdiction. The courts are not concluded by an averment of what is the law in a foreign jurisdiction, contained in a pleading which is demurred to, any more than they would be by the testimony of a witness to the same effect upon a trial; certainly not when the statute upon which the case rests is set forth and the decisions under it are also referred to as evidence of the law. The demurrer does not admit as a fact that the construction (in form of an averment of fact) which the pleader may choose to put upon those statutes or decisions is the right conclusion to be drawn from them. Notwithstanding the averments in the complaint, we are brought to an examination of the statutes and decisions referred to, in order to ourselves determine what the law of Minnesota is. * * *

Whether, aside from the Federal considerations just discussed, the Wisconsin court should have permitted this action to be maintained, because of the principle of comity between the states, is a question exclusively for the courts of that state to decide. The right to maintain it under the facts of this case is not founded upon any provision of a Federal nature, and we

cannot supervise the action of the Wisconsin court in this particular.

The judgment of the Supreme Court of Wisconsin must be affirmed.

GILLETTE v. PEABODY.

19 Col. App. 356. [1904.]

THOMSON, P. J. This action was brought by the appellant, as a citizen and tax payer of Colorado, to restrain the appellees, a commission created by statute, from awarding a contract to the Mills Publishing Company for the publication and sale of the reports of the opinions of the Court of Appeals, and to compel them to award the contract to the Banks Law Publishing Company. A demurrer was interposed to the complaint, on the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiff declining to amend, judgment was entered for the defendants. The plaintiff appeals. * * *

Finally it is said that the allegation that the contract was awarded to the Mills Company because of its proposition to do the work within the state and to employ union labor was admitted by the demurrer, and that the awarding of the contract for that reason was in itself an act of discrimination. It is nowhere averred that in making the award the commission did not act in good faith. Nothing in the nature of fraud is charged against them. In *Johnson v. Sanitary District*, *supra*, it is said that, in the absence of fraud, it is beyond the province of the court to control a discretion vested in public officers. We have no authority to inquire into the grounds on which this award was made. Those grounds may have been insufficient. The power of the commission to decide, involved the power to decide erroneously, but their decision, whether correct or not, cannot be reviewed in this proceeding. In *Douglas v. Commonwealth*, *supra*, the court said: "If the authorities act in good faith, although erroneously or indiscreetly, mandamus will not lie to compel them to modify or change their decision."

A demurrer admits everything that is well pleaded, but a matter which the courts are debarred from considering is not well

pleaded. The complaint is no better with the allegation than it would have been without it.

We think the demurrer was properly sustained and the judgment will be affirmed.

LANGE v. BENEDICT.

73 N. Y. 12. [1878.]

FOLGER, J. The plaintiff has brought an action against the defendant for false imprisonment, and detention in prison. He alleges that it was wrongful and willful, without just cause or provocation. He does not allege that it was malicious or corrupt. The complaint in the action sets out the facts *in extenso* upon which the plaintiff relies. To this the defendant has demurred, stating three causes of demurrer; but the one cause relied upon, is that the complaint does not state facts sufficient to constitute a cause of action.

It is well, therefore, to state with some particularity the facts which are alleged, or are conceded. In October, 1873, the defendant was judge of the District Court for the United States, of the eastern district of New York. As such, by virtue of an act of Congress, he presided at and held the Circuit Court of the United States for the southern district of New York, for the October term of that year. The plaintiff was at that term arraigned upon an indictment of twelve counts, the general purport of which was that he had stolen, embezzled, or appropriated to his own use, certain mail-bags, the property of the United States, of the value of twenty-five dollars; he was tried upon the indictment; the verdict of the jury was, generally, that the plaintiff was guilty, and that the value of the mail-bags was less than twenty-five dollars. He was indicted under an act of Congress, which declared the offence and affixed the punishment. By that act, if the value of the mail-bags taken was found to be less than twenty-five dollars, the punishment for the offense was a fine of \$200 *or* imprisonment for one year. The defendant sitting as such judge, and holding that court at that term, passed judgment upon the plaintiff and sentenced him to pay a fine of \$200, *and* to be imprisoned for one year. It is manifest that the punishment thus imposed was more than that affixed to the

offense by the act of Congress. The plaintiff paid to the clerk of the United States Circuit Court, intending it in full payment of the fine so imposed, the sum of \$200. This was done on the 4th day of November, 1873, and during the same term of the court; and the clerk made certificate that the sum was then on deposit in the registry of that court. The clerk paid the money into the office of the assistant treasurer of the United States, in New York city, in that circuit, to the credit of the treasurer of the United States, as the fine thus imposed. There is no direct allegation in the complaint that the plaintiff was imprisoned under that sentence. There is an allegation, that during the same term of that court, a writ of *habeas corpus* was granted and returned into that court, in which the imprisonment of the plaintiff was made to appear. It may be taken as conceded, however, that the plaintiff was actually in prison for the space of five days after the pronouncing of that sentence, and before further proceedings were had. At the same term of that court, the defendant sitting and holding that court, and as the judge thereof, on the return of that writ vacated and set aside the sentence above set forth, and at the same time and as part of the same judicial act and order, passed judgment anew upon the plaintiff, and resented him to be imprisoned for the term of one year. Under this action of the defendant, the plaintiff was imprisoned; which is the alleged wrongful imprisonment and detention of him by the defendant.

Judicial proceedings were afterwards had in behalf of the plaintiff, the end of which was that the Supreme Court of the United States adjudged the resentence, above stated to have been pronounced, without authority, and discharged the plaintiff from his imprisonment. It does not appear that the defendant was a party to the proceedings in the Supreme Court, or was heard or represented there.

On this state of facts, the plaintiff insists that the defendant is liable to him in damages. The defendant claims that the facts show that all which he did, he did as a United States judge, and that the judicial character in which he acted protects him from personal responsibility.

In our judgment, the question between the parties is brought to what, in words at least, is a very narrow issue: Did the defendant impose the second sentence *as a judge*; or although he was at the moment of right upon the bench, and authorized and

empowered to exercise the functions of a judge, was the act of resentencing the plaintiff so entirely without jurisdiction, or so beyond or in excess of the jurisdiction which he then had as a judge, as that it was an arbitrary and unlawful act of a private person? A narrow issue, but not easily determined to the satisfaction of a cautious inquirer.

The plaintiff makes a preliminary point, that inasmuch as the complaint avers that the defendant wrongfully and willfully, and without jurisdiction, falsely imprisoned the plaintiff, that, therefore, as a technical rule of pleading, the demurrer having admitted the allegations of the complaint, there must be judgment for the plaintiff. But the complaint does not rest satisfied with that general allegation. It rests the general allegation upon the special circumstances afterwards set forth in it, and which are made up of all or nearly all the facts which we have above recited. So we have to consider them as well as the general allegation, and to treat the general allegation as no broader or more effectual than the special circumstances upon which the complaint rests it.

There are not many topics in the law which have received more discussion and consideration than that of the liability of a person holding a judicial, or *quasi* judicial office, to an action at law, for an act done by him while, at the same time, exercising his office. The principles which should govern such actions, are, therefore, well-settled. The difficulty in satisfactorily disposing of a particular case is, not in finding the rule of law upon which it is to be decided, but in determining on which side of that rule the facts of the case do lie. * * *

For these reasons, we are of the opinion that the defendant is protected by his judicial character from the action brought by the plaintiff. * * * The judgment of the General Term (sustaining the demurrer) should be affirmed.

Judgment affirmed.

COOKE v. TALLMAN.

40 Iowa, 133. [1874.]

The same facts are involved in all of these causes, and they are submitted upon one abstract. The petitions allege that the defendant prosecuted certain suits, wherein the plaintiffs in

these actions were defendants, for the purpose of setting aside plaintiff's titles, based upon tax sales and deeds, to certain lands which were claimed by defendant; that plaintiffs were non-residents of the State, and service was had upon them by publication; that such service was illegal, and not sufficient to give the court jurisdiction; and that judgments by default in the actions were rendered against the plaintiffs. The relief asked is that the judgments be set aside, and the proper plaintiffs be allowed to appear and defend in each suit. A demurrer to each petition was sustained, and plaintiffs in each case appealed. The other facts of the case necessary to an understanding of the point ruled, appear in the opinion.

BECK, J. * * * The law in force at the time provides that "the publication must be made by publishing the notice required * * * in some newspaper published at least weekly, and *printed* in the county where the petition is filed, and if there be none printed in such county, then in such paper printed at the next nearest county of this state, which paper shall in either case be determined by plaintiff's attorney." Acts 13th General Assembly, Chapter 142. Code § 2619.

It may be admitted that the newspaper in which the publication may be made, must be *printed* in the county where the suit is brought, and if there be none such then the notice must appear in a newspaper *printed* in the next nearest county. The petition alleges that the newspaper in which the publication was made was printed in Webster county, and that no newspaper was printed in Pocahontas county. It also shows that the notice was published in the newspaper determined by plaintiff's attorney. Now the question to be decided is this: Is Webster the next nearest county as contemplated by the statute? The court will take judicial notice of the boundaries of counties, and their relative location. Webster county lies adjacent to Pocahontas. Four other counties also have common boundaries with it, and it had corners in common with two others. Of these, which, in the language of the statute, is "the next nearest county?" The statute makes no provision as to the town in which the paper is published, further than it shall be "at the next nearest county." Five counties lie equally "*near*" Pocahontas, that is, they have boundary lines in common with it. Suppose in each of these counties newspapers were published, how should the question have been determined as to the one in which the

publication should have been made? The statute provides it shall be determined by plaintiff's attorney. It is evident that of these five counties, each being adjacent to Pocahontas county, any one may be considered the next nearest, if so determined in the manner and by the person pointed out in the statute. The publication, therefore, of the notice in a newspaper printed in Webster county, upon the determination of plaintiff's attorney, was a strict compliance with the law.

II. But the petition alleges that Humboldt is "the next nearest county." This contradicts the record pleaded by plaintiffs, which shows that Webster county was so determined in the manner pointed out by law and other facts, the location and boundaries of the different counties, of which the courts will take judicial notice. A fact which is judicially known to the court is to be regarded as a matter of law, and therefore cannot be pleaded. A contradiction or denial of such a fact cannot be well pleaded, and is not admitted by a demurrer. Rev., § 2917. Code, § 2712. The demurrer therefore did not admit the allegation of the petition just stated.

Other objections to the ruling of the court upon the demurrer are not presented in the argument of plaintiff's counsel. We are required to regard them as waived.

The judgment in each cause is

Affirmed.

SCOFIELD v. McDOWELL.

47 Ia., 129. [1877.]

This is an action to quiet the title and recover the possession of certain lands, which the plaintiffs claim under tax deeds executed November 6th, and recorded November 9th, 1872. The defendant by answer and cross-bill alleged that the fee simple title is in her, and that the title of the plaintiffs is void, for the following reasons:

1. The defendant after the expiration of three years from the date of the sale, but before the execution of the deed, tendered the full amount necessary to redeem from the sale to the county auditor, and to the holders of the certificates, which they refused to accept.

2. The lands were sold at tax sale in October, 1869, without being advertised for sale.

The plaintiff demurred to the answer and cross-bill, upon the ground that they presented no defense to the plaintiff's action, and did not entitle the defendant to relief. The demurrer was sustained. The defendant refusing to further plead, a decree was entered for plaintiffs. At the April term, 1876, an opinion was filed reversing the decision of the court below. Upon plaintiff's petition a rehearing was granted, and the cause is again submitted for determination.

DAY, Ch. J. I. That the right of redemption must be exercised within three years from the date of sale was determined by this court in *Pearson v. Robinson*, 44 Iowa, 413.

II. The plaintiffs claim title to the lands under two tax deeds executed November 6, 1872, and duly recorded. Section 784 of the Revision provides that the deed, when substantially executed as required and recorded in the proper record, shall be conclusive evidence "that the property was advertised for sale in the manner, and for the length of time, required by law." This provision was held to be constitutional in *Allen v. Armstrong*, 16 Iowa, 508 (514); See, also, *Madson v. Sexton*, 37 Iowa, 562.

The answer and cross-petition admit the execution of the tax deeds under which the plaintiffs claim the land. They admit, also, by implication, that the deeds, in form, are in substantial compliance with the law. But they allege that the lands were sold without any advertisement, and that the deeds are, in consequence thereof, void. The plaintiffs, instead of taking issue upon this allegation of the answer and cross-petition, demurred thereto. It is claimed the effect of this demurrer is to admit the truth of the allegation; that, the truth of the allegation admitted, the answer sets up a good defense, and the cross-petition a good ground for affirmative relief; and that the demurrer should have been overruled.

It is a familiar principle of pleading that a demurrer admits only facts which are well pleaded. The answer and cross-petition, as we have seen, admit the execution of the tax deeds in question. The law attaches to these deeds certain properties or qualities. One of these is that the deeds are conclusive evidence that the lands were duly advertised for sale. Whenever the fact that a tax deed has been duly executed is established by the pro-

duction of the deed in evidence, or by the admissions in the pleadings, the law raises the conclusive presumption that the lands described in the deed were duly advertised for sale. Is it, then, competent for a pleader to admit the execution of such deeds, and at the same time deny the legal inference which the law conclusively raises? It seems to us clear that it is not competent so to plead. If, however, such a pleading is interposed, does a demurrer thereto admit the truth of the allegation improperly made? Suppose a party sued upon a promissory note should admit the due execution of the note, that it was given upon good consideration, that it is the property of plaintiff and unpaid, but should aver at the same time that he owes plaintiff nothing thereon. Would a demurrer to the answer admit the truth of this allegation? Manifestly not. In Gould's Pleadings, p. 470, section 25, it is said: "A demurrer though general, never confesses an allegation which it appears upon the face of the pleadings that the pleader is estopped to make, as if, having pleaded or confessed a record, to which he is a party, he afterwards makes an averment contradicting or impugning it."

Suppose the plaintiffs, instead of demurring, had gone to trial upon the pleadings. The defendant then would not have been permitted to introduce any proof that the lands were not advertised. If, because of the law and the conditions of the pleadings, the defendant would not have been permitted to offer any proof of this allegation upon the trial, it must be true that a demurrer to it does not admit its truth.

The demurrer was properly sustained.

Affirmed.

TAYLOR v. BLAKE.

11 Minn., 255. [1865.]

WILSON, C. J.: This action was brought to recover personal property alleged to have been obtained from the plaintiff's grantor by duress. * * *

It will be observed that the complaint shows that the arrest was made by the sheriff of Olmsted County, on a warrant issued by Walter S. Booth, a justice of the peace, in pursuance of a complaint made, as required by law. The defendant demurred

to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and because there was a defect of parties. The demurrer having been sustained by the court below, and judgment having been entered for defendant, the plaintiff appeals to this court. There is no doubt but that money or goods obtained by duress or undue influence may be recovered; and the demurrer admitting all the material and traversable allegations of the complaint, the question presented to us for determination is, whether the complaint *shows* that the defendant obtained the chattels in question from Taylor by duress or undue influence. Did the complaint not show that Taylor was imprisoned by process *prima facie* valid, perhaps the allegation that he was unlawfully imprisoned might be held sufficient. But it is a general rule that imprisonment by order of law is not duress; to constitute duress, the arrest, or subsequent detention must be tortious and unlawful, and as the complaint in this case shows an arrest by an officer legally authorized to make such arrests, and on a warrant *prima facie* valid, we have no right to *presume* that either the arrest or subsequent detention was illegal. It is for the plaintiff to show this. (Taylor v. Cottrell, 16 Ill., 93; Watkins v. Baird, 6 Mass., 511.) The complaint and warrant were perhaps not in strict accordance with the requirements of the statute, but yet they were clearly sufficient to give the court jurisdiction, and to justify the sheriff in making the arrest, and, therefore, they must be held valid when attacked collaterally, as in this case. The plaintiff's counsel insists that the warrant was void, and the arrest illegal, because the justice had no authority to issue such warrant returnable before himself. This position is taken on the assumption, unauthorized by any allegation of the complaint, that the offense with which Taylor was charged was committed within the corporate limits of the City of Rochester, and that the city justice has exclusive jurisdiction of such offense, and that Walter S. Booth was not the city justice.

The allegation in the complaint, that Blake and his servants and agents "*well knew*" that the acts of Taylor, mentioned in the complaint and warrant, and upon which the proceedings before the justice were based, transpired within the corporate limits of the City of Rochester, and that the city justice had exclusive jurisdiction of said proceedings, is merely an allegation of the *knowledge* of the defendant and his agents, and is not an

allegation that the facts were as it is alleged the defendant knew them to be. An issue joined on such an allegation would have been wholly immaterial. The rule of pleading is elementary, that facts must be alleged directly, and not by way of recital, argument, inference, or reasoning; and that recitals, inferences, or conclusions are not admitted by a demurrer. We in vain look for a single traversable allegation of the complaint *showing* that either the arrest or detention was illegal or tortious. * * *

Judgment affirmed.

THOMPSON v. FOX.

47 N. Y. S., 176. [1897.]

MCADAM, J.: The defendants having declined to avail themselves of the liberty to answer, given by the order overruling their demurrer, final judgment went against them, from which this appeal is taken. * * *

The complaint does not set forth a cause of action for "use and occupation." The second paragraph furnishes no aid to the third, because it affirmatively appears that the rent reserved by the lease referred to in the second paragraph has been fully paid, and the lease does not embrace the *locus in quo*.

The gravamen of the complaint is trespass—that the defendants, without right, took possession of, and wrongfully used, certain parts of the store premises not covered by their demise, and respecting which they were not tenants. * * *

In order to hold the defendants for use and occupation, it should have affirmatively appeared that the original entry upon the premises not covered by the demise was under and by virtue of the plaintiff's permission, or that a permission subsequently expressed was accepted or recognized by the defendants, so as to show that they consented to hold under her, and in subordination to her title. 1 Wood, Landl. & Ten. (2nd Ed.), p. 2.

"Permission given by the owner to one in possession tortiously will not convert his occupancy into a tenancy, unless he accepts such permission, and hold in pursuance of it." *Id.*, p. 16. The mere ownership of the land by one, and its occupation by another, do not necessarily imply that the relation of landlord and tenant exists between the parties, for the mutual consent of their

minds to enter into such relation is absent, and without this union there can be no agreement. *White v. Corlies*, 46 N. Y., 467; 1 Par. Cont. (6th Ed.), 475. One who is *ab initio* a trespasser cannot be made a tenant against his will by the mere election of a person claiming title, for the conventional relation is founded only on mutual consent.

The action has been treated throughout, both by the plaintiff and the court below, as one for use and occupation, and the substantial sum of \$803.75 awarded to the plaintiff on the sole theory of an implied agreement to pay. The pleader evidently prepared the complaint with the design of avoiding the real grievance—trespass *quare clausum fregit*—making the action resemble, as far as the facts permitted, one founded upon an implied agreement creating the conventional relation of landlord and tenant. With remedies so inconsistent, it is not surprising that the pleading cannot be commended as a precedent for either cause.

The plaintiff succeeded in the court below by disclaiming trespass, and has not upon the appeal urged the sufficiency of the pleading as one in that form. If the complaint is sustained, as it may be, by treating it as one in trespass, the defendants, under the circumstances, ought to have their day in court to meet this new phase of the controversy. If the pleadings state such a cause of action, and we think it does, it is not demurrable, whatever the damages ultimately recoverable may be. The general demurrer interposed goes merely to defects of substance, and not to form, and lies only when no cause of action whatever is alleged. 2 Wait., Prac. 452, 453; *Otis v. Seligman*, 67 How. Prac., 101; *Johnson v. Girdwood*, 7 Misc. Rep., 651, 28 N. Y. Supp., 151, affirmed 143 N. Y. 660, 39 N. E. 21; *Wetmore v. Porter*, 92 N. Y., 76; *Mitchell v. Thorne*, 134 N. Y., 542, 32 N. E. 10; *Sage v. Culver*, 147 N. Y., 241, 41 N. E. 513. Regarding the complaint as in tort for trespass, the demurrer did not admit the quantum of damages alleged (6 Enc. Pl. & Prac., 336, note) for these could be liquidated only by assessment according to prescribed practice. (Code Civ. Proc., § 1215.)

The judgment must be modified, and without costs either below or in this court, by reversing that portion thereof which awards a recovery for the amount demanded in the complaint, with a direction that damages be assessed according to the prevailing practice in cases of trespass, with leave, however, to the

defendants to withdraw their demurrer, and answer over on payment, within 10 days, of \$20 costs. All concur.

McKENZIE v. MATHEWS.

59 Mo., 99. [1875.]

NAPTON, Judge, delivered the opinion of the court.

This was a petition for an injunction. The facts stated in the petition were, that the petitioner was the owner of a certain tract of land described therein; that Mathews & Brumbach threatened to commit waste on it, by cutting down and hauling away timber from it—which would be an irreparable loss to said land. An injunction was therefore asked, to restrain said defendants from cutting any timber or committing any waste on said land, and for such other relief, etc. The application was made to the Circuit Judge, at chambers, in August, 1871, and an injunction was directed, upon bond being given by the petitioner. The bond was given and the injunction issued August 16th, 1871.

At the May term, 1872, of the Circuit Court, a demurrer was filed to this petition on the ground that the facts stated in the petition furnished no ground for the relief prayed, inasmuch as no insolvency was alleged, nor was it averred that there was not an ample and complete remedy at law; nor was there any allegation that any action was pending for the possession of the land upon which defendants were said to have an intention of cutting timber. The demurrer was sustained, but nothing further appears to have been done at that term.

On Dec. 10th, 1872, the defendants filed their motion to dissolve the temporary injunction, and for an assessment of damages. This motion was sustained and, neither party requiring a jury, the court proceeded to assess the damages upon the testimony submitted.

The defendant, Mathews, on this inquiry, testified that he had a contract with Brumbach to deliver to him \$200 worth of lumber; that he had cut the logs from which the lumber was to be sawed, and as he could not use them, they had greatly depreciated in value, and his loss on this item he estimated at \$180. His expense attending court amounted to \$13.50. He was also

prevented from clearing eight or nine acres of land that he intended to clear, and also from making rails to replace a fence that had been washed away by the flood, which he estimated at \$180. His lawyer's fee was \$75.

The plaintiff objected to this evidence because the defendants admitted by their demurrer, that the facts stated in the petition were true, and that the plaintiff was the owner of the land. This objection was overruled, and the plaintiff excepted.

The witness also stated that he was in possession of the land and bought it of the railroad company. To this evidence objection was also made on the ground that the defendants, by their demurrer, admitted the ownership of the land. * * *

The plaintiff asked the following declarations of law: "That the defendants have admitted by their pleadings that the lands mentioned in plaintiff's petition belonged to plaintiff and were the property of the plaintiff, and hence, defendants cannot recover any damages by reason of being restrained from cutting timber off from said lands; 2nd, The defendants cannot recover attorney's fees for defending said suit; 3rd, Defendants cannot recover any damages in this case because there was no answer made by defendants to the petition, before the dissolution of the injunction herein." These last instructions the court refused.

The judgment of the court on the subject of damages was in favor of the defendants, in the sum of \$528.

There was a motion to set aside the finding and judgment, which was overruled; exceptions were duly taken to all the rulings of the court, and the case is brought here by appeal.

The judgment of the court on the demurrer was obviously right. The petition was substantially defective in almost all respects. It is impossible to conjecture from its terms whether the plaintiff or defendant was in possession of the land. If the plaintiff was in possession, then it is not shown that an action of trespass would not have attained all the objects desired. There is no allegation of the insolvency, nor any sufficient allegation of irreparable damages. The former is not always necessary, but in regard to the latter, a general averment that damages threatened are irreparable is insufficient. It must be shown how, and in what way, and for what reason, the threatened damages are irreparable. What damages are irreparable is a question to be decided by the court from the facts stated.

If we chose to infer from the petition that the defendants were

in possession, then it is a mere matter of conjecture what title they claimed, if any; whether they were lessees for years, or tenants for life, or holding under an asserted fee simple title. If the title was in dispute some proceeding on the part of the plaintiff ought to have been stated, to which the injunction would have been auxiliary.

The only question in this case is as to the damages. It is not perceived why Brumback was made a party defendant. The testimony of Mathews that he was prevented from clearing seven or eight acres of land during the pendency of the injunction seems to be a consequential damage too remote; but the only objection to that testimony was, that the demurrer admitted the title of plaintiff. This objection was overruled by the court and we think properly. A demurrer admits facts well pleaded, but only for the purpose of deciding the question raised by it; the statements in the petition demurred to are no evidence on the question of damages, or on the general issue. (*Berne v. Phillips*, 10 Conn., 62.) * * *

The question in regard to the damages was one for the jury, or in this case for the Circuit Court, to whom the facts were submitted. The objections to the items offered were insufficient, and, although we think, in regard to the item of two hundred dollars, which was charged for being prevented from clearing seven or eight acres, that it was inadmissible because too remote; yet as the only objection to it was, that the demurrer admitted the title of plaintiff, and this objection was not a valid one, we will not disturb the judgment.

Judgment affirmed.

RICE v. RICE.

13 Ore., 337. [1886.]

LORD, J.: This is a suit for a divorce. The defendant demurred to the complaint upon the ground that the suit had not been commenced within the time prescribed by the statute. The court below overruled the demurrer, and the defendant refusing to further plead, upon motion, a default was taken for want of answer, and the suit referred to take and report the testimony. Upon the report of the referee, the cause was heard by the court, and the decree rendered, from which this appeal is taken.

The error complained of is the overruling of the demurrer. The Code provides that the defendant may demur to the complaint when it appears upon the face thereof * * * that the action or suit has not been commenced within the time limited by the Code. Code, § 66, sub. 7; id. § 385. But when the suit is for a divorce, it is provided that "when the suit is for any of the causes specified in subdivisions 3, 4, 5 and 6, of section 491, the defendant may admit the charge, and show in bar of the suit * * * that the suit has not been commenced within one year after the right of suit accrued." Code, § 494. The contention of the defendant is that his demurrer is well taken, and in compliance with the requirements of the statute; that it "admits the charge, and directs attention to the complaint, upon the face of which it appears that the suit was not commenced within one year after the right of suit accrued. It is admitted, ordinarily, in actions at law or suits in equity, that, when it appears from the complaint that the action or suit has not been brought within the time limited by the statute of limitations, a demurrer is the appropriate pleading to take advantage of the statute, and bar the action or suit; but in suits for divorce, the plaintiff contends that the statute, in its nature, as special and peculiar, and in order for the defendant to avail himself of it, he must bring himself within its terms and provisions; that the language of the statute that "he may admit the charge, and show in bar of the suit," etc., means that he must admit the charge as a matter of fact, or of evidence, and not as a technical theory of law, before he can take advantage of it.

The real inquiry, then, is whether a demurrer or answer is the proper pleading to take advantage of the statute. The language of the statute is that "the defendant may admit the charge, and show in bar of the suit," etc., that is, admit the truth of the facts charged as facts, and show other facts in bar—confess and avoid—and this is precisely what the defendant claims is the effect of his demurrer. To sustain this view, a demurrer must be an absolute admission of the facts demurred to. What does a demurrer admit? In his treatise on Pleading, Mr. Gould says: "A demurrer to the declaration is not classed among pleas to the action, not only because it may be taken as well to any other part of the pleadings as to the declaration, but also because it neither affirms nor denies any matter of fact, and is not, therefore, regarded as strictly a plea of any class, but

rather an excuse for not pleading." Section 43, c. 2. "To demur is to rest or pause." And, again: "A demurrer merely advances a legal proposition—it forms an issue in law. Admitting the facts so far as well pleaded, for the purpose of taking the opinion of the court preliminarily, its language is: 'Allowing all that is alleged to be true, there is not anything that calls for an answer, plea, or defense.' " Id. c. 9.

In *Pease v. Phelps*, 10 Conn., 62, the court says: "A demurrer presents only an issue in law to the court for consideration; the jury have no concern with it; and, although it is a rule of pleading that a demurrer admits facts well pleaded for the sole purpose of determining their legal sufficiency, yet, as a rule of evidence, it was never supposed that a demurrer admitted anything." In *Tompkins v. Ashby, Moody & M.*, 32, it was held that a demurrer or plea to a bill in equity does not admit the facts charged in it, so as to be evidence against a defendant, if those facts arise in a future action between the same parties; *ABBOTT, C. J.*, remarking that it was nothing more than saying "that, *supposing* the facts charged to be true, the defendant is not bound to answer."

Mr. BLISS says: "In denying the legal conclusions from the facts pleaded, the admission of their truth as facts is necessarily implied, and the old rule was stated, substantially, that the truth of a pleading not obnoxious to a general demurrer was admitted; or, more briefly, that a demurrer admitted the facts well pleaded. Thus, if the demurrer is overruled, and the pleading demurred to thus held to be good, unless the demurrer is withdrawn, judgment will be necessarily rendered against the party demurring, because he has admitted the truth of the pleading; that is, has confessed the facts held to constitute a cause of action or defense. Such is the theory, and yet it is improperly called an affirmative admission. Nothing is, in fact, admitted. The demurrant simply denies the proposition of law involved in the pleading demurred to, and the parties go to trial upon an issue of law, and if the issue is founded against him, judgment goes against him. The facts are admitted only because they are not denied." Bliss, Code Pl. § 418.

A demurrer, then, is not an absolute admission. Its only office is to raise issues of law, upon the facts stated in the pleadings demurred to. Nor, as *CROCKETT, J.*, said, is "the effect of a demurrer to set out the facts. On the contrary, all the facts

involved in a demurrer are those alleged in the pleading demurred to, and the demurrer merely raises a question of law as to the sufficiency of the facts to constitute a cause of action or defense." *Brennan v. Ford*, 46 Cal., 12. When allegations in a pleading are admitted for the purpose of a demurrer, they are admitted for that purpose only, and should not be commented upon by the court as if they were *de facto* true. *Day v. Brownrigg*, 10 Ch. Div. 294. It is a pleading by which one of the parties in effect says that the facts stated by the adverse party in his pleading, even assuming them to be true, do not sustain the contention based on them, or, in a word, do not show a good cause of action or defense. This is not admitting the facts charged as *de facto* true. It is simply admitting the facts for the sole purpose of presenting their sufficiency to the court for determination; or equivalent to saying: "If the facts be so, the defendant is not bound to answer." Now, this is not the kind of pleading, or the admission required by the pleading, which the statute contemplates. It requires the admission of the charge as a fact, not assumed to be true for the purpose of ascertaining its legal sufficiency, but confessed to be true as an actual fact, and a showing of other facts in avoidance or bar of the suit. This cannot be done by demurrer, for its office is not to set out facts. The statute evidently contemplates that the charge admitted, and the other facts shown in bar of the suit, by the defendant, shall be embraced in one pleading to accomplish this result. It says: "The defendant may admit the charge, and show in bar of the suit that the act complained of was committed by the procurement of the plaintiff, or that it has been expressly forgiven, or that the suit has not been commenced within one year after the right of suit accrued." A demurrer cannot perform the office contemplated by this provision. If a demurrer were such a solemn admission upon record as claimed by counsel, then it might be used against the defendant upon a subsequent trial of an issue of fact, and it would become, like other admissions, a part of the law of evidence; yet, as evidence, we all know that it admits nothing whatever.

There was no error. The decree of the court below is affirmed, with costs and disbursements.

EATON v. NORTH.

25 Wis., 514. [1870.]

The plaintiff appealed from an order overruling his demurrer to the answer.

DIXON, C. J.: On argument of demurrer, judgment will be against the party whose first pleading is bad in substance. The complaint in this case is defective in not showing that the plaintiff had a right to redeem the land from taxes at the time it is alleged that he did so. The complaint is under chapter 22, Laws of 1859, upon a tax deed executed December 31, 1867, to one H. Eugene Eastman, in pursuance of a sale of the land recited to have been made in the year 1840. The plaintiff claims title under Eastman, by deed dated October 16, 1868. The redemption of the land from tax sales, for which the plaintiff claims a lien, is charged to have been made by him in 1863. The complaint fails to show, therefore, that the plaintiff had, at the time of such alleged redemption, any interest in or lien upon the land which would authorize him to redeem; and it consequently appears that the certificates for the same tax sales in the hands of the defendant and owned by him, as averred in that part of the answer demurred to, are valid as against the lien or claim of the plaintiff with respect thereto set up in the complaint. With no title to or interest in the land at the time, the plaintiff could not redeem, so as to deprive the defendant of his lien or interest acquired by virtue of the certificates.

By the Court.—*Order affirmed.*

SHIRK v. ANDREWS.*92 Ind., 509. [1883.]*

ELLIOT, J.: The complaint of the appellant alleges that he was the holder of several notes executed by Isaac Beal; that to secure their payment Beal executed a mortgage on eighty acres of land; that Flora Andrews, the appellee, purchased an interest in the land with full knowledge of appellant's mortgage; that after her purchase, but without any knowledge of it, he instituted a suit for foreclosure, and obtained a decree; on this decree

the land was sold and bought by him; that appellee was not made a defendant to the action, for the reason that the appellant believed the land to be owned by her husband, who was at one time the owner; that after the execution of a deed by the sheriff, the appellant sold and conveyed the land to Jacob Krieg, and that he prosecutes the action for Krieg's benefit.

The second paragraph of the appellee's answer sets forth the proceedings in the foreclosure suit, the sale thereon, and avers that the mortgage and judgment were thereby satisfied. To this answer a demurrer was overruled, and upon this ruling rests the assignment of error.

Appellee makes the point that even if the answer was bad it was not error to overrule the demurrer, because it appears on the face of the complaint that the appellant is not the proper plaintiff. It is true that the rule is that the demurrer to an answer will search the record, and if the complaint is bad, there will be no error in overruling it, even if the answer is bad; but this general rule does not apply where the question is as to the parties. It applies only where the merits of the action are involved. Generally, the question of proper parties can only be raised by answer or demurrer, and we think that it should be held in this case that the question as to whether the appellant was the real party in interest ought to have been raised by demurrer or answer. Prior to the act of 1881 (R. S. 1881, section 1073), a deed made while another was in adverse possession was ineffectual, and actions to recover possession or quiet title must have been brought by the grantor, and, as this case is governed by the old rule, it may well be doubted whether it was not properly brought in the name of the appellant. But, without deciding this precise question and confining our decision to the question as it is here presented, we hold that the point of appellee is not well taken.

As the appellee was not a party to the foreclosure suit, the decree does not bind her, and as there was no decree against her, it results that the mortgage as to her was neither merged nor satisfied. It left in her, untouched, the equity of redemption. *Hosford v. Johnson*, 74 Ind., 479.

We understand it to be well settled that if the owner of an equity of redemption is not made a party to the suit, a subsequent suit may be brought to compel him to redeem, and to secure a decree barring his equity of redemption. The rule, as we

hold it to exist, is thus stated by Mr. Jones: "If the owner of the equity has, through mistake, not been made a party, the mortgagee who has purchased at the sale may maintain a second action to foreclose the equity of such owner, and for a new sale, but he cannot recover the costs of the previous sale. 2 Jones Mortg., section 1679.

Judgment reversed.

GARRETT v. TROTTER.

65 N. C., 430. [1871.]

PEARSON, C. J.: It appears by the record that the controversy between the parties is in regard to a lease for a term of three years, which the defendants allege the plaintiff made to Fields.

This allegation is denied by the plaintiff, issue is joined and comes on for trial; but a motion is made by the counsel of the defendants *in medias res*, and the action is dismissed, without the merits of the case being touched.

The first reflection suggested by this state of facts must be under a Code of Civil Procedure, professing its main object to be, to have every case decided "upon the merits," and to this end abolishing the distinction between actions at law and suits in equity, and all the forms of such actions and suits, C. C. P., Sec. 112; abolishing all the forms of pleading heretofore existing Sec. 91; declaring no variance shall be deemed material, unless it has actually misled the adverse party in maintaining the merits on his side, Sec. 128; and allowing amendments on a scale so liberal that it may well be said "anything may be amended at any time;" for, before or after judgment, the pleading, process or judgment may be amended by "inserting other allegations material to the case," and by "conforming the pleading or proceeding to the facts proved," Secs. 131, 132. How does it happen that a case could thus go off, without touching merits?

There is error on the grounds:

1. The complaint alleges that the defendants are in possession of the land, and withhold the same to her damage, one hundred dollars.

The answer admits that the defendants are in possession of the land, but denies that they withheld the same from the plaintiff, illegally, as is alleged in the complaint; and then avers the

fact of a lease by her for a term of three years, which is unexpired.

Admit that the complaint is defective in this, it does not allege in so many words that the defendants illegally and wrongfully withhold the possession from the plaintiff; although as the C. C. P. requires a statement of the facts to be "plain and concise, without unnecessary repetition," section 13; and a statement in "ordinary and concise language without repetition," section 100; it might well be questioned whether the complaint be defective in this particular. But supposing it to be so, the defect is aided by the answer, which shows that defendants understood the complaint to charge an illegal withholding of the possession.

"A defect in pleading is aided, if the adverse party plead over to, or answer the defective pleading in such manner that an omission, or informality therein, is expressly or impliedly supplied or rendered formal or intelligible."

The following are a few instances of an express aider: In an action of debt on a bond, when the declaration specified no place at which the bond was made, it was held that a plea of duress, "*apud B.*," supplied the omission in the declaration, as such a plea contained a distinct admission that the bond was made at the place where the duress was. In an action for slander, when the declaration averred that the plaintiff was foresworn, without saying how, it was determined that this defect was aided by a plea of justification, which alleges that the plaintiff, who was stated in the declaration to be a constable, had taken a false oath at the sessions. And again in an action of trespass for taking a book, when the plaintiff omitted to state that it was his book, or that it was in his possession, and the defendant in his plea, justified the taking the book out of the plaintiff's hand; the court held, on motion in arrest, that "the omission in the declaration was supplied by the plea." 1 Chitty Plead., 671. Our case furnishes another apt illustration of the principle of aider, by admissions express or implied in pleading over. It was said the Code of Civil Procedure nowhere adopts the doctrine of "aider" by admissions in pleading over. The principle commends itself so strongly by its good sense, that it must be taken to underlie every system of procedure, professing to aim at the furtherance of justice, and to put controversies upon their merits, and not allow actions to go off upon subtleties and refinements.

We have seen also that the Code of Civil Procedure is much more liberal in its provisions to meet the merits of controversies, than the system of procedure in England, even after the statutes of *jeofails* and *amendments*, and the statute 4 Anne, requiring all defects in form to be specially assigned as cause of demurrer; and it may be added, that in regard to demurrers, the C. C. P. improves upon the statute of Anne, and requires every demurrer, whether for substance or form, to specify distinctly the grounds of objection to the complaint, sec. 96; *Love v. Com'rs of Chatham*, 64 N. C., 706. When there is a defect in substance as an omission of a material allegation in the complaint, it is a defective statement of the cause of action; and the demurrer must specify it, to the end that it may be amended by making the allegation. And when there is a statement of a defective cause of action, the demurrer must specify, to the end that as there is no help for it, the plaintiff may stop his proceeding without further useless incurring of costs. The distinction between a defective statement of a cause of action, and a statement of a defective title or cause of action, is made, 1 Chitty Plead., 681, and may be illustrated by two instances.

1. The complaint alleges that the defendant, as constable, collected money for the plaintiff, and failed to pay it over; omitting to allege a demand. Here is a defective statement of a cause of action. The complaint alleges that the plaintiff is the assignee of a reversion after a term of years; that at the time of the assignment there was rent arrear due by the defendant, the lessee for years, and the plaintiff demands this rent arrear. Here is a statement of a defective title or cause of action. The distinction is a clear one, and leads to important differences.

2. It is a rule in every system of procedure; "good matter must be taken advantage of, in due form, apt time and proper order." Had the supposed defect, in omitting to allege that the withholding of possession was illegal, been set out as ground of demurrer, the plaintiff could have amended; or if it had been taken in arrest of judgment, after verdict, the plaintiff could have amended *ore tenus*, or availed himself of the principle that certain defects of substance, as well as form, are cured by verdict. This is a well-settled principle. It is thus stated by Seargeant Williams in his notes to Saunders' Reports, 1 Vol. 228, note 1. "When there is any defect or omission in any pleading, whether in substance or form, which would have been a fatal

objection upon demurrer; yet if the issue joined be such, as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict; such defect, imperfection or omission is cured by the verdict, by the common law, or in the phrase often used upon the occasion, such defect is not any *jeofail* after verdict."

In our case the objection was not taken in apt time, or in proper order; but in the midst of the trial, all evidence on the part of the plaintiff is ruled out, and her action dismissed, thus depriving her of the benefit of the principle of certain defects being cured by verdict, if it applied to the case; and at all events depriving her, of the right to amend *ore tenus*, "by inserting other allegations material to the case," and by "conforming the pleading or proceeding to the facts proved," C. C. P., secs. 131, 132. This irregularity furnishes a second ground upon which the plaintiff is entitled to have the judgment set aside, and a *venire de novo* awarded.

It was said upon the argument, the C. C. P. prescribes no order or time for taking objections, and reliance was put upon sec. 99: "If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court; and the objection that the complaint does not state facts sufficient to constitute a cause of action."

The counsel for the defendant and his Honor, fell into error, by not adverting to the distinction above referred to between a defective statement of a cause of action and a statement of a defective cause of action. There is a like distinction between a defect of jurisdiction in respect to the subject of the action, and a want of jurisdiction in respect to the person; for illustration: Action in a Superior Court upon a note for less than \$200; here there is a defect of jurisdiction in respect to the subject of the action; it cannot be helped by waiver, consent, amendment or otherwise, and the sooner the proceeding is stopped the better. Action in the County of Orange, against the Charlotte & Columbia R. R. Co.; here is a want of jurisdiction in respect to the person, which may be waived by consent, or by making full defense or pleading by an Attorney of the Court.

If at any time it appears that the court has no jurisdiction of

the action, or that the plaintiff has no cause of action, the Court may stop the proceedings and dismiss the action, for it is idle to go further; but when the objection grows out of a defective statement of the cause of action, the Court cannot stop in the midst of the trial of an issue and dismiss the action; for, the plaintiff is thereby deprived of the advantage of having the defect or omission in the statement of his cause of action cured by verdict, which is a principle of the common law, and does not depend upon a provision of the C. C. P., provided the case falls within the application of the principle; and at all events he is deprived of the privilege of amending, secured to him by the C. C. P., by having the pleading and proceedings made to conform to the facts proved, which, of course, he cannot avail himself of, should the testimony be all ruled out, and the action abruptly terminated, instead of proceeding in the trial of the issue, and hearing the evidence which the parties have come prepared to offer. After verdict, the defendant may make the objection by motion in arrest.

Judgment reversed.

Section 2. Grounds of Demurrer.

ARTHUR v. RICKARDS.

48 Mo., 298. [1871.]

CURRIER, Judge, delivered the opinion of the court.

The court sustained a demurrer to the petition and dismissed the suit. The judgment of dismissal was informal, but it was final and fatal to the plaintiff's action. The dismissal terminated the suit in the circuit court, and the plaintiff was compelled either to submit to the consequences or bring the cause here.

The defendant demurred upon the ground that another suit was then pending between the same parties and for the same action. It is not pretended that the petition shows any such fact. The demurrer should, therefore, have been overruled. The statute is clear and express on this point. (Gen. Stat. 1865, p. 658, Sec. 6.)

Judgment reversed and cause remanded.

VON GLAHN v. DEROSSETT.

76 N. C., 292. [1877.]

PEARSON, C. J.: In *Von Glahn v. Harris*, 73 N. C., 323, it is held that one creditor could not maintain an action against one stockholder; but that the action should be in the nature of a "creditors' bill," in the name of one or more of the creditors in behalf of themselves and all of the other creditors who may choose to become plaintiffs against all of the stockholders.

Accordingly this action is by *Von Glahn* and the other creditors against *DeRossett*, *Kidder*, and others, who are all of the stockholders known to plaintiffs, with leave to make defendants any other stockholders who may become known to the plaintiffs.

DeRossett and the others defend by way of answer, except *Kidder*, who defends by way of demurrer.

The case now comes before us on the demurrer of *Kidder*.

This is a novel mode of procedure and we are not willing to allow the case to be split up in that way. The defendants are under a joint liability; their interest in the questions involved is identical and much obscurity and confusion will result from a severance in the mode of defence. When there is but one defendant he is not allowed to demur and also to answer; after the demurrer is overruled he can put in an answer, but he cannot defend in both modes at the same time. That would be double pleading in a way not provided for by the statute of Anne. * * *

The second ground of demurrer is the subject of another objection. It is "a speaking demurrer," as styled by the books. That is, in order to sustain itself, the aid of a fact not appearing upon the complaint is invoked, to-wit: the allegation that at the expiration of the charter, the Bank held a fund which should first be applied to the satisfaction of the debts of the plaintiffs. Whether there be any fund left on hand at the expiration of the charter of the bank is a question of fact that cannot be inquired into upon demurrer, which raises only an issue of law in regard to the cause of action set forth in the complaint. * * *

Judgment reversed.

ROBERTS v. JOHANNAS.

41 Wis., 616. [1877.]

COLE, J.: In this case the demurrer must be treated as one to the whole answer. If, therefore, the answer contains matters constituting a defense to the action, which is in substance good, however informally or inartificially stated, the demurrer was properly overruled. We think the answer does deny that the property described in the complaint ever came to the possession of the defendant. But it is said by the learned counsel for the plaintiff that the answer in that respect is faulty, because it denies, in the words of the complaint, that at a particular day the defendant had possession of the property, and thus amounts to a negative pregnant, that on some other day the defendant had possession. The criticism is not sustained by the averment, which is as follows: "The defendant denies that at the time stated in the complaint, or *at any other time*, the property described in the complaint came into the possession of the defendant, or that the same was or remained in his possession at the time of the commencement of this action, as alleged." This is a denial that at any time the property came to the possession of the defendant, and states a complete defense. It surely does not imply that the defendant had possession at some other day than the one named, so as to admit the material fact of possession. The objection is not, therefore, well taken to that part of the answer.

But the other portions of the answer seem to us bad in substance. It is not alleged that the stallion therein mentioned is one of the animals mentioned in the complaint, nor that he was over two years old and suffered to run at large, so as to come within the provisions of ch. 93, Laws of 1870. Had the demurrer been confined to that portion of the answer, it should have been sustained. But it amounts to a demurrer to the whole answer, and, for the reasons given, was properly overruled.

By the Court—The order of the circuit court is affirmed.*

*Accord: Dallas v. MacKenzie, 94 U. S. 660.

HAYDEN v. ANDERSON.

17 Iowa, 158. [1864.]

COLE, J.: I. A demurrer is proper where a pleading appears on its face to be defective either in substance or form; it is a declaration that the party demurring will go no further, because the other has not shown sufficient matter against him to require an answer: 1 Chitty on Plead., 661. A demurrer admits the *facts* pleaded, but controverts their *legal* sufficiency. A demurrer, then, can only be properly interposed where the party controverts the legal sufficiency of the matter stated in the entire count or petition. It is not competent to assail a clause, or a sentence, or several clauses or sentences in a count or petition by demurrer. A demurrer is not a pruning hook, with which to rid a pleading of foreign or improper matter; nor is it a sword, with which to attack and cut off redundant or impertinent averments in a pleading. If a count in a pleading contains sufficient statements to constitute a cause of action or defense, it is not vulnerable to a demurrer, although it may contain very much of foreign, improper, redundant, impertinent or scandalous matter. Nor can such matter be reached by demurrer; and, therefore, a so-called demurrer "to all that part," or "to so much as sets up," etc., in a certain count, does not rise to the dignity of a demurrer, and is not entitled to its name, and whenever sufficient matter is stated in such count to constitute a cause of action or defense, such so-called demurrer should be overruled.*

DODGE v. COLBY.*108 N. Y., 445.† [1888.]*

RUGER, C. J.: We concur in the conclusions reached by that court in respect to this portion of the complaint. The counts referred to, we think, under the liberal system established by the code, each clearly stated a good cause of action in trespass *quare clausum fregit*, and entitled the plaintiff, if sustained, to recover

*See, also, O'Haver v. Shidler, 26 Ind. 278.

†For the statement of this case, see *ante*, p. 785.

for all damages accruing to him from the acts described therein. It constitutes no answer to this proposition that the plaintiff might have recovered, upon the facts stated, some of the damages alleged to have been sustained by him, in an action of trover, so long as the gravamen of the charge was the unlawful intrusion upon his real estate. The cutting and tapping of trees constituted the real basis of the damages claimed. While the counts referred to, each allege the value of the timber and turpentine claimed to have been carried away from the premises of the plaintiff, this is merely incidental to the trespass alleged, and the complaint concludes with a general prayer for judgment which would recover the damages arising from the alleged unlawful entry upon the plaintiff's lands and the trespasses committed thereon, as well as the incidental damages arising from the conversion of his property. The doctrine that the courts of this state have no jurisdiction of actions for trespasses upon lands situated in other states is too well settled to admit of discussion or dispute. *Telegraph Co. v. Middleton*, 80 N. Y., 408; *Cragin v. Lovell*, 88 N. Y., 258. The claim urged by the plaintiff that if not permitted to maintain this action he is without remedy for a most serious injury, is quite groundless, and affords no reason for the assumption of a jurisdiction by this court which it does not possess. The plaintiff would seem to have the same remedy for the trespasses alleged that all other parties have for similar injuries. His lands cannot be intruded upon without the presence in the state of the wrong-doer, and no reason is suggested why he could not seek his remedy against the actual wrong-doer in the courts having jurisdiction. His remedy is ample, and it is no excuse for assuming a jurisdiction which we do not have, that the plaintiff desires a remedy against a particular person rather than one against the real perpetrators of the injury who were exposed to prosecution in the place where the wrong was committed. * * *

The general term, we think, also erred in sustaining the demurrer to the third count upon the ground that there was an improper joinder of causes of action. It is quite true that under section 484 of the Code of Civil Procedure, causes of action for slander cannot properly be joined with actions for injuries to real property; but this was not the ground of objection stated in the demurrer. The ground there specified was that a cause of action of a transitory nature, of which the court had jurisdiction,

had been united with one for trespass upon land in another state, of which the court had no jurisdiction. This is not one of the grounds of demurrer authorized by the Code. It is a proper ground of demurrer that the court has not jurisdiction of any specified cause of action; but this does not authorize a demurrer upon the ground that such causes of action are united with one of which it has jurisdiction. The first and second counts of the complaint must be held bad upon the ground that the court had not jurisdiction of the subject of the action, but no sufficient ground of demurrer has been presented to the third count, and it must, therefore, be held good. The Code requires the grounds of demurrer to be specifically stated, and when that is not done it may safely be disregarded. Code Civil Proc., § 490.

Judgment reversed in part.

FULTON FIRE INS. CO. v. BALDWIN.

37 N. Y., 648. [1868.]

MASON, J.: * * * The action is, in short, to recover for a loss of property, sustained by the plaintiffs' assignor in consequence of the defendant's negligence in suffering the sunken canal-boat to impede the navigation of the canal and endanger the property of those navigating the canal.

The only remaining question in the case is whether the defendant, under this demurrer, specifying only ground of objection to the complaint, and which is, that the complaint does not state facts sufficient to constitute a cause of action, can insist on the objection that the plaintiffs are not incorporated and have not capacity to sue.

There are six grounds of demurrer to the complaint allowed by the Code. The first is, "*that the court has not jurisdiction of the person of the defendant or the subject of the action.*" The second is, "*that the plaintiff has not legal capacity to sue;*" and the sixth is, "*that the complaint does not state facts sufficient to constitute a cause of action.*" (Code, § 144.) The 145 section declares that the demurrer shall distinctly specify the grounds of objection to the complaint, and that unless it does it may be disregarded.

And section 147 provides that whenever any of the matters enumerated in section 144 do not appear on the face of the complaint, the objection may be taken by answer. And then comes in section 148, which declares that, if no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court; and the objection that the complaint does not state facts sufficient to constitute a cause of action. The complaint in this case states a good cause of action in favor of John Van Buren, Jr., against the defendant, and a valid assignment and transfer of that cause of action to the plaintiff; and the omission in the complaint to allege that the plaintiffs are incorporated and have capacity to sue cannot be taken advantage of by the defendant on this demurrer because of his omission to specify this ground of objection to the complaint.

There is no force or meaning to language or this omission to specify this ground of objection to the complaint, operates as a waiver to the objection. The 144th section recognizes six distinct grounds of demurrer to the complaint, and the 145th section declares that the demurrer shall distinctly specify the grounds of objection to the complaint, and the 148th section declares that, if no such objection be taken, the defendant shall be deemed to have waived the same, except the objection to jurisdiction, and that the complaint does not state facts sufficient to constitute a cause of action. The complaint states a good cause of action, and that the plaintiffs have become the owners of it, by a valid transfer thereof to them, but does omit to allege that the plaintiffs are a corporation having capacity to sue. This objection must, therefore, be regarded as waived. It is just and reasonable that the rule should be so. If this objection to the complaint is well taken, and the defendant had specified this ground of demurrer, the plaintiff would most probably have amended his complaint and inserted proper averments to show them a corporation having authority to sue. It is a question, to say the least, whether such an allegation in the complaint is necessary, and the statute relieves the plaintiff from proving it, unless the defendant sets it up in his answer. (2 R. S., 458, § 3.) The judgment of the Supreme Court must be reversed and judgment given for the plaintiff on the demurrer, with leave to the defendant to answer on the payment of the costs of the demurrer in this court and in the Supreme Court.

NORTHROP v. WILLS.

65 Kan., 769. [1902.]

DOSTER, C. J.: This was an action in debt to recover the amount of a lumber bill. The plaintiff alleged in his petition as follows: "That it is, and was at all the times hereinafter stated, a corporation duly chartered, organized, and existing under and by virtue of the laws of the State of Texas." The defendants demurred to the petition for the reason that it showed on its face a lack of legal capacity to sue. The demurrer was overruled, a trial had, and judgment rendered for plaintiff. Proper objections to the sufficiency of plaintiff's evidence were made and overruled. The defendants have prosecuted error to this court.

The ground of the demurrer to the petition was that the pleading showed the plaintiff to be a foreign corporation, but failed to show that it had complied with the requirements of chapter 10 of the laws of the Special Sessions of 1898, the last provision of section 12 of which act reads as follows: "No action shall be maintained or recovery had in any of the courts of this state by any corporation doing business in this state, without first obtaining the certificate of the Secretary of State that the statements provided for in this section have been properly made." The above mentioned act of the special sessions of 1898 has been held to apply to foreign as well as domestic corporations. *State v. American Book Co. (Kan.), 69 Pac., 563.* The demurrer was not well taken. The petition did not show on its face that the plaintiff lacked legal capacity to sue. It did not show anything on the subject; and, as against a demurrer, it did not need to make such showing, because demurrers to petitions will only lie when the defect affirmatively appears on the face of such pleading. "But this point cannot be raised by a demurrer upon the ground that the complaint shows on its face that the plaintiff has no capacity to sue, for the complaint does not show anything of the kind. The most that can be said is that the complaint fails to show that the plaintiff has been invested with power to sue, but such omission affords no ground for demurrer, as it is based upon a defect (if defect it be) in the complaint, and not upon what it shows upon its face. The Code, in section 165, allows a demurrer only when it appears upon the face of the com-

plaint that the plaintiff has not legal capacity to sue; and, as that does not appear upon the face of the complaint in this case, it is clear that the demurrer cannot be sustained on the first ground, as the Code does not provide for a demurrer on the ground of any omission in the complaint, except an omission to state facts sufficient to constitute a cause of action." *Commission Co. v. Poole*, 41 S. C., 70.

*Judgment affirmed.**

PENCE v. AUGHE.

101 Ind., 317. [1884.]

. HOWK, J.: The first error assigned by the appellant, Carrie Pence, upon the record of this cause, is the overruling of her demurrer to appellee's complaint.

In his complaint, the appellee, as guardian of Aaron W. Pence, a person of unsound mind, alleged that theretofore, at the . . . term of the court below, he was duly appointed the guardian of Aaron W. Pence, who was then and there adjudged by the court to be of unsound mind; that appellee qualified and entered upon the discharge of his duties as such guardian; that Aaron W. Pence was of unsound mind and was extremely weak, physically and mentally, to such an extent as to render him wholly unfit to care for himself, or to comprehend and understand the effect and purport of any contract he might enter into or be induced to make; that the defendant, Carrie Spriggs, was a woman about forty or forty-five years of age; that, on July 30, 1883, Carrie Spriggs represented to the clerk of Tippecanoe Circuit Court that she was a *bona fide* resident of Tippecanoe county, and procured from such clerk a marriage licence, authorizing her marriage to and with Aaron W. Pence; that on Sunday, September 9th, 1883, Carrie Spriggs and Aaron W. Pence procured a carriage and went to the place about two miles in the country, away from the influence and control of the guardian and relations of Aaron W. Pence, and under the pretended authority of such marriage license, and by the services and ceremonies performed by a minister of the gospel, a pretended marriage ceremony was performed, having for its primary object

*See, also, *Parlin & Orendorff Co. v. Boatman*, 84 Mo. App. 67.

and purpose the union of Aaron W. Pence and Carrie Spriggs in the holy bonds of matrimony; that Carrie Spriggs had ever since claimed to be the wife of Aaron W. Pence, and claimed an interest in his property and her support from the same, as if she were his lawful wife, and had assumed the name of Carrie Pence, by which name the appellee asked that she be notified of this proceeding, as well as by her lawful name of Carrie Spriggs, the two names representing one and the same person; that Aaron W. Pence was made a defendant, that he might be notified of the proceeding and answer thereto, if he had any other interest therein than that represented by his guardian, the appellee; that Carrie Spriggs, well knowing the feebleness and weakness of Aaron W. Pence's mind, influenced and persuaded him to enter into such pretended marriage relation with her, without the knowledge or consent of his guardian. Wherefore, etc.

To this complaint, the appellant, Carrie Pence, demurred upon the following grounds: 1. That it did not state facts sufficient to constitute a cause of action; and, 2. That the appellee had not the legal capacity to sue.

It is clear, we think, that the second cause of demurrer does not present for decision the question which appellant's counsel manifestly sought to present thereby, namely: Whether or not the appellee, as the guardian of a husband of unsound mind, may maintain an action in his own name to obtain a decree annulling and setting aside the marriage of such husband? It has often been decided by this court that a demurrer to a complaint assigning as cause, "that the plaintiff has not legal capacity to sue," has reference only to some legal disability of the plaintiff, such as infancy, idiocy or coverture, and not to the fact that the complaint fails to show a right of action in the plaintiff. *Dale v. Thomas*, 67 Ind., 570; *Dewey v. State ex rel.*, 91 Ind., 173; *Traylor v. Dykins*, 91 Ind., 229. It was not shown by the complaint, in this case, that the appellee, Aughe, was incapacitated to sue, by reason of any legal disability.

The first cause of demurrer assigned by the appellant, however, presents not only the question of the sufficiency of the facts stated to constitute a cause of action, but a cause or right of action in the plaintiff. If the facts stated were sufficient to show that the marriage might be annulled at the suit of the husband, the question would still remain for decision, whether or not the legal guardian of the husband might institute and

maintain, in his own name as guardian, a suit for the annulment of such marriage. * * *

Judgment reversed.

STATE EX REL. MATNEY v. SPENCER.

79 Mo., 314. [1883.]

HENRY, J.: This action was commenced in Buchanan Circuit Court against Spencer and his co-defendants, sureties, on his official bond as sheriff of said county. * * *

To this petition defendants filed a general demurrer, on the ground that it did not state facts sufficient to constitute a cause of action against defendants. The court sustained the demurrer and rendered judgment for defendants, from which this appeal is prosecuted. * * *

It appears from the petition that the sale under the first execution was made October 31st, 1877, and this suit was not commenced until December 16th, 1880, more than three years after the sale. The sheriff's duty was to sell for cash, and it was his right and duty to demand of the bidders the amounts bid by them, respectively, on that day. And, therefore, the statute commenced running on the day of the sale. That three, and not ten years is the limitation. State ex rel. v. Minor, 44 Mo., 374; Kirk v. Sportsman, 48 Mo., 383; Lesem v. Neal, 53 Mo., 419.

When the statute creates an absolute bar by the mere lapse of time, without any exception, the defense may be made by demurrer if the necessary facts appear upon the pleading. State to use, etc., v. Bird, 22 Mo., 473.

Our statute of limitations is a bar, if the defendant will avail himself of it, but if he answer without pleading it, although it appears upon the face of the petition that the time prescribed by the statute elapsed before the suit was commenced, the court will take no notice of it, and plaintiff will recover if the defendant fail to make out the pleaded defense. The statute provides that "the demurrer shall distinctly specify the ground of objection to the pleading; unless it does so it may be disregarded." In Almutt v. Leper, 48 Mo., 320, Bliss J., said: "The statute is imperative, that the demurrer shall specify the ground of objec-

tion to the pleading, and when so specified the court will not take notice of other objections." In *McClurg v. Phillips*, 49 Mo., 316, the demurrer, as in the case at bar, was general, that the petition did not state a cause of action. It was claimed that it was properly sustained, because of an improper joinder of causes of action, but the court said (Bliss, J.): "This reason was not named in the demurrer, and therefore should not have been considered, even if the objection was a good one. 'The demurrer shall,' etc. (quoting the statute). 'May,' in this connection, means 'should,' and we will only look to the objections specified." See also *Cheely v. Wells*, 33 Mo., 106.

Judge Bliss, in his valuable work on Code Pleading, seems to approve the ruling of the Supreme Court of California, on a similar statute, announced in *Kent v. Snyder*, 30 Cal., 672, as follows: "Whenever the defense is of the nature of a special privilege, of which the party can only avail himself by pleading it, then his pleading, whether by demurrer or answer, must specify the ground of his defence." Our conclusion is, that while a defendant may demur to a petition, either at law or in equity, which shows upon its face that the cause of action is barred by the statute of limitations, in a suit at law, whatever may be the rule in equity, it must be a special and not a general demurrer, as distinctly held in 33, 48, and 49 Mo., *supra*.

The judgment is reversed and the cause remanded. All concur.

TRUSTEES v. KILBOURNE.

74 Wis. 452. [1889.]

Action by the trustees of Kilbourne Lodge, No. 3, of Ancient, Free, and Accepted Masons, against Byron Kilbourne et al. Judgment was rendered for Kilbourne and Thorndike and plaintiffs appeal.

TAYLOR, J.: The appellants commenced an action against the respondents and the said Hoyt and Kniffen, in the Superior Court of Milwaukee county, and in such action filed a complaint against all the respondents, demanding equitable relief against all of them. To this complaint Frank M. Hoyt answered. Knif-

fen does not appear to have answered or demurred. The other defendants, the Kilbournes, Thorndike, McCallum, and Vizay, demurred to the complaint, alleging as grounds of demurrer that the complaint does not state facts sufficient to constitute a cause of action as to them. Upon the hearing of this demurrer, the court below sustained the demurrer, and from the order sustaining such demurrer, plaintiff appeals to this court.

The ground upon which the demurrer was sustained is that, upon all the facts stated in the complaint, the plaintiff is not entitled to any equitable relief against them. Under the decisions of this court the demurrer was properly sustained, although the facts stated may be sufficient to constitute a cause of action at law against them. This court has frequently decided that a demurrer to a complaint, which is clearly intended by the pleader as a complaint in equity, because it does not state facts sufficient to constitute a cause of action, will be sustained if the facts do not constitute a cause of action in equity, and such demurrer will not be overruled on the ground that such complaint states a cause of action at law. *Supervisors v. Decker*, 30 Wis. 624; *Tewksbury v. Schulenberg*, 41 Wis. 584; *Denner v. R. R. Co.*, 57 Wis. 218, 15 N. W. 158; *Pierce v. Carey*, 37 Wis. 234; *Gormely v. Association*, 55 Wis. 350, 13 N. W. 342. The effect of these decisions is that, upon such a demurrer, the defendant may avail himself of the objection to the complaint that, upon the facts stated, the plaintiff has an adequate remedy at law, and for that reason his complaint is bad as a complaint in equity. Upon the hearing of the appeal in this case, the learned counsel for the appellants argued at length, and with great ability, the question whether the plaintiff had shown by its complaint that it had title to the real estate in question. This question, however, the learned attorney for the respondents declined to argue, and relied solely on the ground taken by them in the court below, viz., that upon the facts stated in the complaint it clearly appears that the plaintiffs have an adequate remedy at law. This is, therefore, the only question we are at liberty to determine upon this appeal.

After a careful reading of the complaint, which sets forth at length the alleged title of the plaintiff, and which, for the purpose of this decision, may be admitted to show a good title in the plaintiff, and a right to the possession of the real estate in question, we are constrained to agree with the court below that the plaintiff has an adequate remedy at law. The allega-

tions of the complaint upon the theory that the plaintiff acquired title to the real estate in question at the time stated in said complaint show that immediately after that date, and before the plaintiff had taken any actual possession of such real estate, the defendants the Kilbourns claimed the title and the right of possession adversely to the plaintiff, and by their tenant took the actual possession of the premises, and held such possession, in hostility to the claim of the plaintiff at the time of the commencement of this action. This state of facts shows clearly that an action of ejectment would be an adequate remedy for the plaintiff. In such action the title of the plaintiff would be adjudicated as well as the right of possession of the defendants. If, in such action, it should be held that the plaintiff had no title, that would end the controversy; on the other hand if the plaintiff's title should be established, that would end the controversy, because in such action the plaintiff would recover of the tenants and their landlords, the Kilbourns, rent for the use of the premises as well as damages, if any injury or waste to the premises had been committed by the defendants. There seems to us an entire absence of any sufficient reason for invoking the aid of a court of equity to settle the rights of the parties to this action. It seems very clear to us that a court of equity would have no power to compel the tenants of the Kilbourns to attorn to and become the tenants of the plaintiff, against their consent. In a contest between the plaintiff and the tenants the court can only determine whether the tenants or the plaintiff has the title or the right to the possession, but it cannot force the tenants of the claimant, Kilbourn, to become the tenants of the plaintiff. The complaint charges no fraud on the part of the Kilbourns or on the part of their tenants. It simply charges that the Kilbourns have no title to the premises, or to the rents arising out of the same, except what is secured to them by the lease which it sets up as its title. The other allegations of the complaint show that the Kilbourns deny this alleged fact, and claim to have an interest in the premises hostile to the title of the plaintiff. They assert a legal title hostile to the plaintiff's title, and, being in the actual possession, the proper way to determine the rights of the parties is by an action of ejectment. The fact that the complaint shows a cause of action in equity against the defendant Hoyt does not help the plaintiff as against the demurring defendants.

Hoyt does not question the sufficiency of the complaint, and has answered the same.

The order of the superior court is affirmed, and the cause is remanded to the superior court of Milwaukee County for further proceedings according to law.

Judgment affirmed.

EASLEY v. PREWITT.

37 Mo. 361. [1866.]

The petition set forth a contract made with plaintiff by defendants for the building of a church, alleged the performance of the contract, the acceptance of the work, and the amount due thereon; and then alleged, that more than three months before the commencement of this action, he gave said defendants notice in writing that he would proceed to enforce his lien, by the sale of said church property, as is provided in said contract heretofore mentioned, for the purpose of paying the balance due and owing him for the building of said church. Wherefore plaintiff asks judgment against the said defendants, trustees of said church, for the sum of nine hundred and twenty dollars, and the interest due thereon, and an order for the sale of said lots, and the said building thereon, for the purpose of satisfying said judgment, and for other proper relief. A demurrer to the petition was sustained.

WAGNER, Judge, delivered the opinion of the court.

The demurrer in this case was improperly sustained. A petition is not demurrable because it asks a judgment not warranted by the averments; nor is its character always determined by the relief it prays for. The court may grant any relief consistent with the case made and embraced within the issues. (R. C. 1855, p. 1280, § 12; Northcraft v. Martin, 28 Mo. 469). The petition stated a good cause of action on the agreement; but if the plaintiff wishes to foreclose his lien on the building, he ought to amend his petition, and set out the condition and the breach.

The judgment will be reversed and the cause remanded. Judge Holmes concurs; Judge Lovelace absent.

TENNANT v. PFISTER.

51 Cal. 511. [1876.]

The plaintiffs and others, and W. B. Rogers, Philip Roach, John Heinlen, Harvey Swicard, and Charles H. Mitchell, were owners of the rancho Santa Teresa in the county of Santa Clara, and, on the 25th day of August, 1876, commenced an action for the partition of the rancho. By the final decree, the rancho was divided into subdivisions numbered from one to fifty-nine, and there was allotted to plaintiff Tennant, lots 52, 9, 34, and 50; to plaintiff McLellan, lot 47; to plaintiff Cottle, lots 29, and 42; to Wm. A. Senter, lots 17, 4, 25; and to the deceased, Wm. Center, lot 16. The said Rogers, Roach Heinlen, Swicard and Mitchell appealed from the decree and gave an undertaking, among other things, to pay the value of the use and occupation of the land allotted to others and which they occupied, if the decree was finally confirmed. The decree also awarded to each person possession of the land allotted to him. By the undertaking, proceedings on the decree were stayed. The undertaking was filed October 14, 1868. The Supreme Court affirmed the judgment, and the remittitur was sent down on the 21st day of February, 1870. (See 38 Cal. 637.) The appellants, pending the appeal, were in possession of portions of the tracts allotted to the plaintiffs, as follows:

John Heinlen continued to occupy and possess exclusively fifteen acres of lot 29, one acre of lot 30, one hundred and sixty acres of lot number 16, and one hundred and sixty acres of lot number 9. Wayne B. Rogers continued to occupy and possess exclusively thirteen acres of said lot 42, and one acre of lot number 16. Harvey Swicard continued to occupy and possess exclusively twelve acres of lot 29, and thirty-three acres of lot 38. Charles H. Mitchell continued to occupy and possess exclusively eighty acres of lot 47, and three acres of lot 38, and eighty-eight acres of lot 50. Philip Roach continued to occupy and possess exclusively sixteen acres of lot 9.

The defendants were sureties on the undertaking, and this action was brought on the same to recover the value of the use and occupation of the several parcels of land thus occupied by the defendants. The defendants appealed. (For the decision of this case on the former appeal, see 45 Cal. 270.)

The other facts are stated in the opinion.

By the Court:

1. If upon the face of a complaint there appear to be a misjoinder of parties plaintiff, the objection must be taken by special demurrer, and if not so taken, it is waived. Under a general demurrer, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, a question of misjoinder of parties plaintiff cannot be raised.* (Gillam v. Sigman, 28 Cal. 637.) Upon the former appeal in this case it appeared that a demurrer to the complaint on the ground that there was a misjoinder of parties plaintiff therein had been overruled, and that the defendant had thereupon pleaded the general issue, and set up certain new matter in bar of the action. At the trial, which led to that appeal, the court, upon motion of the defendant, excluded all the evidence of the plaintiffs on the ground that there was a misjoinder of parties plaintiff on the face the complaint. This, we said, was not proper practice, and that the demurrer on that ground having been overruled, the case should have been disposed of, as though no such demurrer had been interposed, unless the court should first set aside its order overruling the demurrer, and permit it to be again presented for consideration. This was the entire scope of the decision then made here, and the counsel for the respondent is therefore mistaken in supposing that upon the former appeal we determined, either actually or by implication, the sufficiency of the complaint in any respect. The determination here upon that appeal, concerned only the question of practice in the respect referred to. (Tennant v. Pfister, 45 Cal. 270.)

2. Upon the return of the cause to the court below, the action was again tried, and judgment rendered for the plaintiff. The present appeal is taken from the judgment, and the principal point relied upon is that the court improperly overruled the demurrer to the complaint for misjoinder of parties plaintiff. The demurrer should have been sustained. The plaintiffs seek a joint recovery of moneys, in which they have no joint interest. The plaintiff Tennant, for instance, has no interest in a recovery for the use and occupation of lot 47, detained not from him, but only from his co-plaintiff, McLellan; nor has the plaintiff Cottle any interest in a recovery for the use and occupation of

*Contra in *Indiana*, *McIntosh v. Zaring*, *ante*, p. 242.

lot 52, detained from plaintiff Tennant. The case of Fowler v. Frisbie, (37 Cal. 34), is decisive of this case.

Judgment reversed and cause remanded, with directions to sustain the demurrer to the complaint.*

MORAN v. CARROLL.

35 Ia. 22. [1872.]

MILLER, J. 1. The objection made by the demurrer of Carroll is, that the plaintiffs join in the action, while their interests are several and not joint. This is not a *defect* of parties, but, if an objection at all, it is a misjoinder of parties, which consists in joining as plaintiffs persons who have not a joint interest in the subject of the action. A *defect* of parties occurs where there is an omission of some one of the persons who ought to have been made a plaintiff or defendant along with others. At common law this was called a nonjoinder. Where one who should have been joined, either as plaintiff or defendant, is omitted, a *defect* of parties occurs. But not so where persons are joined who ought not to be. This is a misjoinder.

A petition may be assailed, by demurrer, for a *defect* of parties, but not for a misjoinder.† Beckwith v. Dargets, 18 Ia. 303, and cases cited in opinion of Wright, J. Section 2876 of the Revision of 1860 specifies “*defect* of parties,” as a ground of demurrer, but omits misjoinder. While at common law a misjoinder, as well as nonjoinder, of parties could be objected to by demurrer, it cannot, under our system, which does not permit a demurrer for any cause that does not come under some of the specifications provided in section 2876 of the Revision. School Dist. Tp. of Sioux City v. Pratt, 17 Ia. 16; Byers v. Rodabaugh, id. 53, and cases cited. * * *

Judgment affirmed.

*See, also, Nevil v. Clifford, 55 Wis. 161.

†Under the Code of Iowa.

BASS v. COMSTOCK.

38 N. Y. 21. [1868.]

MASON, J. The demurrer in this case was properly stricken out and judgment given for the plaintiffs. There is no misjoinder of causes of action. There are two causes of action upon two promissory notes well stated in the complaint, but the accusation against the complaint, as I understand it, is, that the causes of action are not separately stated, as required by section 167 of the Code. This section does declare that the causes of action must be separately stated, but the better opinion seems to be that such causes of action are not improperly united, simply because they are not separately stated by the pleader. (*Dorman v. Kellam*, 14 How. Pr. 184; 1 N. Y. Pr. 367; *Gooding v. McAlister*, 9 How. Pr. 123; *Robinson v. Judd*, 9 How. 378; *Peckham v. Smith*, 9 How. Pr. 436.) These cases, and others which might be referred to, hold that a demurrer does not lie to a complaint for not separately stating two or more causes of action, they being such as might be properly united in one complaint, if properly and separately stated, but that the remedy of the defendant is by motion. There are cases which hold that a demurrer for such a defect in the complaint will lie and is the proper remedy. (8 How. 177; 9 id. 198; 4 id. 226, 228; 5 id. 171; 11 id. 27.) These cases hold that several causes of action are improperly united where they are not separately stated, as required by section 167 of the Code. The decided weight of authority in the Supreme Court, however, is the other way, and the better reason is, that, when the causes of action are such as may be united in the complaint, a demurrer will not lie for such a cause.

It must be borne in mind that section 167 allows the causes of action upon these two notes to be joined in the same complaint, but it declares that they must be separately stated. If we turn to section 144, it will be seen that a demurrer can only be interposed for the causes stated in that section, none of which touch this case, unless it is the fifth sub. of that section, and which is, that several causes of action have been improperly united.

That is improperly united in the complaint. This section 144 states, that the defendant may demur to the complaint, when it

shall appear, upon the face thereof, that several causes of action have been improperly united. Now, section 167 declares, that these causes of action may properly be united in the same complaint, and the injunction imposed upon the pleader, that such causes of action shall be separately stated, is a rule of pleading, and which has been violated when this is not done, but I am not able to perceive how it can be said that the causes of action have been improperly united in the complaint.

Now, section 144 does not say that a demurrer may be interposed to the complaint where several causes of action, which may be properly joined under section 167, because they are united in one count, and not separately stated. The demurrer is not given for uniting in count separate causes of action, but for uniting in the complaint causes of action, which it is not lawful, under section 167, to unite in the same complaint. It is true, the pleader, in this case, has violated a rule of pleading enjoined by this same section. It does not follow, however, that this demurrer can be maintained. There are other rules of pleading prescribed by the Code, the violation of which will not give the defendant his demurrer.

This view is greatly strengthened by the last paragraph of section 172 of the Code, which makes it the duty of the court, where a demurrer to the complaint shall be sustained because of the improper misjoinder of causes of action, to order them to be separated, and that they be proceeded with as separate actions.*

Judgment affirmed.

HILES v. JOHNSON.

67 Wis. 517. [1886.]

ORTON, J. These two cases are substantially alike in respect to the questions presented on appeal. The complaints are, first, in ejectment, with the usual averments, as against defendants claiming title to the premises, and it is averred "that the defendants claim title to said lands, and an interest therein and claim to be the owners thereof, and the whole thereof; but this

*But the fact that the different causes of action are not separately stated will not deprive a defendant of his right to demur for misjoinder. *Wildes v. Suydam*, ante, p. 563.

plaintiff insists that said claims of the defendants are unlawful, and their pretended title thereto is void, and ought to be cancelled of record." Following the usual prayer for judgment in ejectment is the following: "And that said defendants' title thereto be adjudged void, and canceled of record, and that this plaintiff have such further and other relief as shall be just and equitable." In the second case there is a claim for damages for waste under section 82, Rev. St., and prayer for injunction against waste *pendente lite*, and there is a general prayer for relief, but no special prayer for the cancellation of the defendants' title. These complaints were demurred to on the ground that several causes of action have been improperly united in said complaints. The demurrers were overruled, and the defendants have appealed. The contention of the learned counsel of the appellants is that, united with the proper averments in complaints in ejectment, are the proper averments and prayer to quiet title, or to remove a cloud from the title of the plaintiff.

It has long been settled by this court that, in order to make a complaint multifarious, the count which is claimed to be improperly joined must set out a good cause of action. *Bassett v. Warner*, 23 Wis. 673; *Truesdel v. Rhodes*, 26 Wis. 215; *Willard v. Reas*, Id. 540; *Lee v. Simpson*, 29 Wis. 333. The case of *Leidersdorf v. Second Ward Bank*, 50 Wis. 406, S. C. 7 N. W. R. 306, is not in conflict with the above cases. It is held in that case only that *if* the complaint stated *any* cause of action, it stated two causes, and was therefore demurrable. It was not decided whether the complaint stated any good cause of action.

2. Does either of these complaints state any good cause of action, except in ejectment? An improper demand for relief is not ground for demurrer. *State v. Smith*, 14 Wis. 564. In *Tewksbury v. Schulenberg*, 41 Wis. 584, the complaint set out a good cause of action to recover tolls for passing the defendant's logs over the plaintiff's dam and slides, and demands judgment in money, and also that it be declared a lien on the logs. On demurrer to the complaint, it was held that a demand for a greater or different relief than the averments of the complaint show the plaintiff entitled to is not one of the grounds of demurrer under our statutes. It follows that the mere prayer for judgment for cancellation of any title the defendants may have in the premises is not sufficient to make a cause of action, or make the complaint demurrable. To constitute a complaint,

there must be "a plain and concise statement of the facts constituting each cause of action." Section 2346, subd. 2 Rev. St. These complaints do not state a single fact which would entitle the plaintiff to such relief. (1) The plaintiff is not in possession. (2) No specific claim of the defendants is stated, and there is no averment that they ever relied upon any specific claim or title. No facts are stated to show that there is any cloud on the plaintiff's title to be removed. In short, there are no averments whatever which constitute any second cause of action upon which the prayer for relief, beyond that in ejectment, could be based. I do not understand that the learned counsel of the appellants seriously contend that there are any such averments, but reliance is placed on the law that none are necessary, and that the prayer is sufficient. The demurrers were properly overruled.

The order of the circuit court in each case is affirmed.*

*Compare *Faesi v. Goetz*, 15 Wis 231, *ante*, p. 488.

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